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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL., PETITIONERS,

vs.

SUN OIL COMPANY, ET AL.

No. 496

SUN OIL COMPANY, ET AL., PETITIONERS,

vs.

G. E. BURFORD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR CERTIORARI FILED OCTOBER 27, 1942.

CERTIORARI GRANTED { **DECEMBER 14, 1942.**
JANUARY 18, 1943.

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CAPTION.

BE IT REMEMBERED, that at a regular term of the United States District Court in and for the Western District of Texas, the Honorable Robert J. McMillan, United States District Judge, presiding, and holding its sessions at Austin, Texas, which said term began on the 27th day of January, A. D. 1941, and continued in session to and included the 7th day of February, A. D. 1941, there came on to be heard and determined, among other causes pending on the docket, the following cause:

No. 28 Civil Action.

SUN OIL COMPANY, a Corporation, and MAGNOLIA PETROLEUM COMPANY, a Corporation,

versus

G. E. BURFORD, THE RAILROAD COMMISSION OF TEXAS, LON A. SMITH, G. A. SADLER AND E. O. THOMPSON, and X Y Z OIL AND GAS COMPANY, a Corporation.

AMENDED ORIGINAL BILL OF COMPLAINT.

In the United States District Court for the Western District of Texas, Austin Division.

Sun Oil Company, Plaintiff,

vs. Civil Action, File No. 28.

G. E. Burford, X. Y. Z. Oil & Gas Company, The Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson, Defendants.

To the Honorable Judge of said Court:

Sun Oil Company, a corporation, herein called plaintiff, files this its Amended Original Bill of Complaint against

G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas and the members thereof, Lon A. Smith, G. A. Sadler and E. O. Thompson in their official capacities, herein called defendants, and for cause of action respectfully shows:

1.

This is a civil suit wherein the matter in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00, and is a suit between a citizen of the State of New Jersey and citizens of the State of Texas and Oklahoma, in that plaintiff is a corporation duly organized and doing business under and by virtue of the laws of the State of New Jersey, and G. E. Burford is a citizen of the State of Texas residing in Dallas County, Texas, and the above named members of the Railroad Commission of Texas are citizens of Texas and reside in Travis County, Texas, and the Railroad Commission of Texas is an official board of the State of Texas, permission to sue which board has been granted by Section 14 of Chapter 76, Acts of the Forty-fourth Legislature of the State of Texas, Regular Session, page 189, as amended by Chapter 15, Acts of the Forty-fifth Legislature of the State of Texas, Regular Session, page 17; and X. Y. Z. Oil & Gas Company is a corporation organized under the laws of Oklahoma, maintaining an office in Dallas County, Texas, whose president and agent for service is G. E. Burford of said county and state; and by reason of such facts and also by reason of the Federal questions herein presented this Court has jurisdiction over this cause.

2.

Plaintiff is engaged in the oil and gas producing business in the State of Texas and has a permit from the State of

Texas authorizing it to conduct such business in said State.

3.

By instrument dated July 31, 1930, duly recorded in Volume 4, page 1 of the Deed Records of Gregg County, Texas, W. L. Fuller and wife, Vannie Fuller, the fee owners of the land hereinafter described, conveyed to J. A. Reynolds an oil, gas and mineral leasehold estate in and to the following described land situated in Gregg County, Texas:

"A part of the D. Sanchez H R Survey, situated about 8 miles NW of Longview, Texas, Beginning at a stake in the South line of the Alexander Survey, being the NW corner of a tract surveyed for J. B. Harley and now owned by Bob Smith;

"Thence West, passing the SE corner of the M. Irwin Survey at 731 vrs. on 751.4 vrs. to a corner in the S. line of the said Irwin Survey;

"Thence South 751.4 vrs. to a stake on the West bank of a branch from which a Maple brs. S 77 E. 7 vrs.;

"Thence E. 751.4 vrs. to a large Sweet Gum in a branch for corner;

"Thence North 751.4 vrs. to the place of beginning, and containing 100 acres of land, more or less."

By instrument dated September 15, 1930, duly recorded in Volume 60, page 115 of the Deed Records of Gregg County, Texas, said J. A. Reynolds assigned said entire leasehold estate to Mamie S. Hammonds.

On December 18, 1930, by an instrument recorded in Volume 67, page 47 of the Deed Records of Gregg County, Texas, O. O. Hammonds and Mamie Hammonds assigned said original leasehold estate to Claude Bell and R. A. Graddy, "In so far as it covers the E fifty (50) acres of the above described land"; and said lease as to said east 50 acres is now operated by Magnolia Petroleum Company.

On February 28, 1931, by instrument recorded in Volume 75, page 86 of the Deed Records of Gregg County, Texas, O. O. Hammonds and Mamie S. Hammonds assigned said original leasehold estate to plaintiff, "In so far as it covers the West fifty (50) acres of the above described tract of land"; and continually since said time plaintiff has owned, and now owns said leasehold estate and has developed same for oil and gas purposes by drilling seven wells thereon, and said lease is in full force and effect, and by virtue thereof owns all the oil and gas and other minerals thereunder, subject to payment of a one-eighth royalty on oil and stipulated royalties on gas and other minerals as specified in its lease.

4.

On November 26, 1919, the Railroad Commission of Texas, pursuant to powers granted it by the oil and gas conservation laws of the State of Texas, and for the purpose of conserving such oil and gas, adopted and promulgated what is known as Rule 37 governing the spacing of oil and gas wells in the State of Texas, providing that no oil or gas well shall thereafter be drilled less than 150 feet from a property or division line nor less than 300 feet from any drilling or completed oil or gas well on the same or adjacent tract or farm, and providing for granting of exceptions to said rule by said Commission, after notice to adjacent lessees, where necessary to pro-

tect vested rights or prevent waste of oil and gas. Said Commission could grant exceptions to said rule only on the grounds therein provided, and said rule was valid and binding, applied to the area now known as the East Texas Oil Field of which the lands herein described are a part, and after its adoption continuously remained in effect in said area, except in so far as same was amended and superceded by special well spacing rules adopted by said Commission for special application in said field. On September 2, 1931, after expressly finding that the spacing of wells in said field under the terms of its Rule 37 threatens to cause actual physical waste due to the too rapid dissipation of gas energy in the production of oil and also due to the too rapid encroachment of water in said field and in the interest of preventing actual physical waste of oil and gas therein it is desirable to modify Rule 37 as applied to said field and further expressly finding that such amendment is reasonably necessary and will prevent or greatly minimize such waste therein, said Commission adopted its first special spacing rule applicable to said East Texas field, providing no well should thereafter be drilled for oil or gas in said field at any point less than 660 feet from any drilling or completed well or less than 330 feet from any property or division line, and providing for exceptions in the same manner and under the same terms as is provided in said statewide Rule 37. By special orders dated September 10, 1931, February 25, 1932, April 30, 1932, June 30, 1932, January 31, 1933, June 13, 1933, and October 17, 1933, said Commission, on expressly finding such provisions necessary to prevent physical waste of oil and gas in said field, (the order of February 25, 1932, further finding that the reservoir energy of said field has been dissipated at an excessive rate due to excessive and disproportionate withdrawals of oil therefrom) further amended said statewide rule in so far as it applied to said field, and each

of said special amendments provided that no well should hereafter be drilled in said East Texas Field nearer than point less than 660 feet from any other drilling or completed well or at any point less than 330 feet from any property or division line, and provided for special exceptions in the same manner and on the same terms as is provided in the above described statewide Rule 37 after notice and hearing. From November 26, 1919, to February 25, 1932, said statewide rule or one of said special field amendments issued prior to the last mentioned date was in effect, constituting a continuous regulation of spacing and drilling of oil and gas wells in said field, and since February 25, 1932, there has been in effect continuously, up to May 29, 1934, one of said successive special spacing rules applicable to said field requiring wells to be spaced not less than 330 feet from any property or division line and not less than 660 feet from any drilling or completed wells.

On May 29, 1934, effective as of that date, Rule 37 was further amended by the Railroad Commission as applicable to the East Texas Field so as to read as follows, to-wit:

"Rule 1. Spacing Rule. No well for oil or gas shall hereafter be drilled in said East Texas Field nearer than 660 feet to any other completed or drilling well on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line, or subdivision line; provided that the Commission in order to present waste, or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired application therefor shall be filed with the Com-

mission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equalling four hundred feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling, and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten days notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect the property belonging to applicant from confiscation. All pending applications shall be amended to conform to this rule before being acted upon.

"No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule, and no well drilled under such a special permit which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas; and any such well so drilled in violation of said rule or in violation of a permit granted as a special exception to said rule shall be plugged.

"The order entered by this Commission on August 30, 1933, commonly designated as the direct and equidistant offset order is hereby rescinded, annulled and shall be of no further force and effect. All other rules, regulations

and orders of this Commission which conflict with the terms and provisions of Rule No. 1 as hereby amended and promulgated are hereby declared to have no further application to wells in said East Texas Field to the extent of such conflict.

"In the adoption and promulgation of this order it is here declared that the Commission intends to adopt each phrase, sentence and paragraph, separately and independently of each other such phrase, sentence and paragraph, and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion."

Said order remained in effect continuousiy until after the filing of Plaintiff's Original Complaint herein on July 20, 1939, and all provisions thereof are still in effect, except that on or about July 24, 1939, said Commission added a provision that the Commission on its own motion may call a hearing to determine whether exceptions shall be granted to said rule for either of the purposes therein named.

In connection with said amendment dated May 29, 1934, and supplementing same, the Railroad Commission on said date entered an order applicable to the East Texas Field, reading as follows:

"It Is Ordered by the Railroad Commission of Texas that in applying Rule 37 (Spacing Rule) of statewide application and in applying every special rule with relation to spacing in every field in this State no sub-division of property made subsequent to the adoption of the original spacing rule will be considered in determining whether or not any property is being confiscated within the terms of such spacing rule, and no sub-division of

property will be regarded in applying such spacing rule or in determining the matter of confiscation if such subdivision took place subsequent to the promulgation and adoption of the original spacing rule."

Said supplemental order dated May 29, 1934, has remained in effect continuously since the date of its adoption and is now in effect.

Each of said special amendments applicable to said field were and are valid and binding regulations and all were adopted by said Commission pursuant to the oil and gas conservation laws of the State of Texas, for the purpose of preventing waste of oil and gas in said field.

Under said amended rule the Railroad Commission has the right to grant exceptions thereto only where necessary for the purpose of preventing confiscation of property by drainage of oil therefrom through wells on adjoining tracts, provided the particular property on which it is proposed to drill a well in exception to said rule has not been subdivided from other properties or created into a separate tract from adjoining properties for development purposes since November 26, 1919.

Under the law of the State of Texas, the creation of a strip or tract of land too narrow to be drilled in compliance with said spacing rules, arising by assignment or subdivision of portions of an original leasehold estate in land, does not create a right to an exception to either of the above mentioned spacing rules, and does not create a "vested right" nor a necessity to drill in order to prevent "confiscation of property" within the meaning of said terms as used in aforesaid rules.

5.

On or about June 18, 1938, G. E. Burford filed with the Railroad Commission of Texas an application for permit to drill four wells, in exception to the spacing rules of said Commission hereinabove mentioned, on a strip of land located midway between the east and west lines of said Fuller 100 acre tract and extending from the north to the south lines thereof, being described in said application as 45.8 feet wide at the south end and 49.8 feet wide at the north end and 2127 feet long north and south and containing 2.33 acres, claiming that by actual measurement between its four corners there is contained in said Fuller tract as originally leased 102.33 acres of land. After due notice and hearing at which plaintiff contested said application, Defendant Commission, by order dated September 21, 1938, denied said application as to all four locations in Cause No. 26,868 on the Rule 37 Docket, Oil and Gas Division of said Commission.

On January 9, 1939, Defendant Burford filed with said Commission a new application for permit to drill four wells on said 2.33 acres, at substantially the same locations, and on January 10, 1939, said Commission granted a rehearing on said application, and after due notice a hearing was held on said new application on January 31, 1939, plaintiff again contesting same, and by its order dated March 25, 1939, in the above mentioned case number said Commission granted permit to Defendant Burford to drill well location No. 2 on said strip, and denied permit for well locations Nos. 1, 3 and 4, thereon, and a copy of said order is attached hereto as Exhibit "A" and made a part hereof as if copied herein.

On April 5, 1939, Defendant Burford filed with said Commission a petition for rehearing on his locations Nos. 1, 3 and 4, which rehearing said Commission granted by

its order dated April 29, 1939. On April 6, 1939, plaintiff filed with said Commission its petition for rehearing on Burford's No. 2 location and a rehearing thereon was likewise granted by said Commission by its order dated April 29, 1939.

Thereafter said Commission issued notice of rehearing to be held May 19, 1939, on the application of G. E. Burford for special permit to drill wells Nos. 1 to 4, inclusive, on said 2.33 acres of land, at the same locations described in his application filed January 9, 1939, and plaintiff again contested said application at said rehearing, and by its order dated June 2, 1939, said Commission granted Defendant Burford a special permit to drill each of the four locations applied for by him, said locations being as follows:

#1—330 feet S of the N. line; midway between E. and W. lines.

#2—489 ft. S. of location #1; midway between E. and W. lines.

#3—489 ft. S. of location #2; midway between E. and W. lines.

#4—330 ft. N. of S. line; midway between E. and W. lines.

A copy of said order is attached hereto as Exhibit "B" and made a part hereof as if copied herein.

Thereafter, within the time prescribed by an order of said Commission for the filing of motions for rehearing, plaintiff filed with said Commission on June 2, 1939, its petition praying that a rehearing be granted and that after further hearing the above mentioned orders granting

Defendant Burford a special permit be canceled, and in the alternative that the allowable production for said four locations be so adjusted, and the permit for drilling and operating same be so conditioned, that the total allowable production from said 2.33 acre strip on each producing day shall not exceed 2.33 100 of the total allowable production of the remaining and adjoining 100 acres of the W. L. Fuller tract as fixed by said Commission for each day, and said Railroad Commission denied said petition by its order dated July 10, 1939, without further hearing, and without granting any of the relief therein prayed for.

6.

At the hearings held on said application it was proved and plaintiff shows as a fact that in Cause No. 54,769 plaintiff and Magnolia Petroleum Company were awarded a final judgment by the District Court of Travis County, Texas, against the Railroad Commission of Texas, the members thereof, and Mamie S. Hammonds, O. O. Hammonds and T. S. Schroeder, cancelling permit issued by the Railroad Commission of Texas to Mamie S. Hammonds by order dated October 11, 1934, permitting the drilling of an oil and gas well on the same strip covered by Burford's application at a point 412 feet from the north line and midway between east and west lines of said strip; that it was in issue in said case that said well was not necessary to be drilled and operated either for the purpose of preventing waste of oil and gas or for the purpose of protecting vested rights of the owner of the leasehold estate in said strip, and that by reason of the subdivision the strip was not entitled to be developed as a separate tract under the field spacing rule, and said issues were necessarily adjudicated in said judgment; that since the entry of said judgment G. E. Burford claims to have acquired by assignment through Mamie S. Hammonds, O. O Hammonds and T. S. Schroeder the oil and gas

leasehold estate in said strip, and they are the source of such title as he has. By reason of said judgment the Railroad Commission had no jurisdiction or authority to grant a permit for the drilling of each or either of the locations applied for by Defendant Burford in that there existed at the time of the hearings on Burford's application no such change of conditions occurring since said judgment as would entitle said strip to a permit for each or either of said locations. Plaintiff shows that no additional wells have been drilled since the date of said judgment offsetting the northern part of said strip on which is situated the well location for which permit was canceled by said judgment; that Burford's No. 1 location is only 82 feet from the location for which permit was canceled by said judgment; that the existing reservoir conditions under said strip are the same and bear the same relation to reservoir conditions in the field generally as at the date of said judgment and date of permit thereby canceled; that each of the Burford locations is no more necessary as an exception to the spacing rule in said field than the location for which permit was canceled in said judgment, and the drilling of wells on said strip was no more necessary to prevent waste of oil and gas at the dates of the several hearings on Burford's application than at the date of said judgment or at the date of said prior permit.

7.

At the hearings on said Burford application it was proved, and plaintiff now shows, that there was then pending in the District Court of Travis County Cause No. 53,915, styled Sun Oil Company vs. Railroad Commission, et al., in which suit there was in issue the authority of the Railroad Commission of Texas to grant a permit in exception to the field spacing rule permitting the drilling of a well for oil or gas at the identical location as Burford's location No. 1, and in said suit the

issue was raised that said location is not necessary under either ground of exception to said rule, and that because of its size and the fact of subdivision it is not entitled to be developed as a separate tract under said rule; said suit being in the nature of an appeal from an order of the Railroad Commission of Texas dated February 1, 1934, granting Mamie S. Hammonds special permit to drill said well location in exception to the field spacing rule. Because of the pendency of said suit said Railroad Commission had no jurisdiction to grant Defendant Burford a permit to drill his well location No. 1, or any other location on this land, and its orders granting Defendant Burford's application for permit are illegal and void.

8

None of the members of the Railroad Commission were present at the hearings on said Burford's applications, same being conducted before an examiner, who then made his report to said Commission in the form of a memorandum after each hearing; and in acting on said applications said Commission had before it said examiner's memorandum, but not all the evidence heard and offered at the hearings. Said Commission employs an informal procedure in disposing of applications of this character, and objections made by plaintiff to admissibility of evidence offered by applicant at said hearings were not ruled upon by the examiner, and were not presented by said examiner's memorandum to said Commission for a ruling, nor were such questions ruled on by said Commission, but the case was presented by the examiner to said Commission as if all testimony adduced were legally admissible and received without objection. Said memoranda did not correctly or sufficiently state all the evidence offered by plaintiff, and the memorandum of the hearing held May 19, 1939, erroneously states plaintiff's witness testified the drilling of these four locations will

bring about a more uniform spacing of wells on the entire Fuller 100 acres, fails to state that said witness testified the entire Fuller tract was protected from drainage by wells on other tracts, and fails to state the reasons and facts testified to by said witness in support of such statement. The examiner's memoranda of hearings were not available to plaintiff for correction, amplification or exception before being submitted to said Commission, and said Commission has established no procedure for correction of an erroneous memorandum, or for the taking of exceptions to same, and has no rules or procedure allowing the filing of bills of exception or providing for consideration thereof. By reason of such procedure plaintiff has been denied a full and proper hearing by said Commission, and will be deprived thereby of its property without due process of law guaranteed it by the Fourteenth Amendment to the Constitution of the United States; and plaintiff expressly urged in its petition filed with said Commission on June 22, 1939, that a rehearing should be granted it for such reasons.

9.

At the first two hearings Burford offered in support of his application testimony by a petroleum engineer to the effect that the field spacing rule implies that a well will not effectively drain farther than 330 feet from the well, that there are four areas approximately in the center, east and west, of the Fuller 100 acre tract which are more than 330 feet from any adjacent well and which under the alleged implication of said spacing rule were not being efficiently drained, in the opinion of applicant's witness; that said areas would be within 330 feet of the four Burford locations, and the drilling of said four locations, in the witness' opinion, was therefore necessary to prevent waste of oil and gas within the meaning of said rule as interpreted by said witness. Said testimony was ob-

jected to by protestants at said hearings on the ground that said spacing rule contains no such implication in that where wells are evenly spaced at the minimum distances of 660 feet apart provided in said rule there will be areas 466 feet distant from the nearest well, and therefore the adoption of said rule by said Commission in order to prevent waste implies a finding by said Commission that a well will efficiently drain in said field a minimum distance of 466 feet. Burford's said witness also testified at said hearings that in his opinion the closer wells are drilled to each other (irrespective of whether they are the distance required in the spacing rule) the more oil will be recovered from the field, and that therefore, in his opinion, each of the four Burford locations would increase recovery from the field and thus prevent waste. It was undisputed that each of said locations is less than 660 feet from adjacent wells, and in fact only one of said Burford locations is as much as 450 feet from adjacent wells, and the remainder are at closer distances. Said last mentioned opinion testimony was objected to by plaintiff at said hearings on the ground that it is merely a collateral attack upon the wisdom of the field spacing rule which cannot be legitimate evidence of a necessity for an exception in this proceeding under said rule to procure permit. The examiner's memorandum stated applicant's contention that the wells are necessary to drain the area effectively, but neither of said objections to such testimony was presented by the examiner's memorandum to said Commission for a ruling, and said Commission made no order or ruling on said objections. Said testimony so objected to was inadmissible and does not constitute substantial evidence that the drilling of said Burford locations, or either of them, is necessary to prevent waste within the meaning of said field rule, and because of the admission of such improper evidence the orders of said Commission granting Burford permit to drill should not be sustained by this Court on any pre-

sumption that said Commission found or was entitled to find the wells necessary to prevent waste. Said Commission did not make the file separate findings of fact in connection with said Burford application, and the only finding made by said Commission is the finding contained in its orders attached hereto as Exhibits "A" and "B", to the effect that said four locations are necessary to prevent "confiscation of property". Plaintiff further shows said orders granting permit are not sustainable on the ground of necessity to prevent waste because plaintiff offered testimony by petroleum engineers at said hearings showing such wells are not necessary for such purpose, because said Commission did not find them necessary nor grant same on the ground they are necessary to prevent waste, and because said Commission is legally required to pass on the facts in the first instance, and to uphold said permit on the ground that there was some substantial evidence before said Commission exclusive of the inadmissible evidence received by it that said Burford locations, or either of them, are necessary to prevent waste would permit a taking of plaintiff's property, as hereinafter detailed, without compensation and without either an administrative or judicial determination of the facts on said issue, denying plaintiff due process of law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

10.

At said hearings there was no evidence, and no substantial evidence that the drilling of said four locations is necessary to enable Burford to produce an amount of oil equal to the amount of recoverable oil under said 2.33 acre strip, or negativing undisputed testimony offered at said hearings that one well on said strip under the proration orders of the Railroad Commission will produce oil approximately three times as fast in proportion to its

underlying reserves as the adjacent portions of the Fuller tract, and will ultimately produce in excess of the equivalent of the recoverable oil under the strip and four wells would give said strip an undue advantage in drainage opportunity over such adjacent portions; or that, disregarding the subdivision of said 2.33 acre strip from plaintiff's Fuller 50 acre lease, the entire area of 52.33 acres needed permit for four additional wells, or that the four locations granted would be the proper locations to be granted on said 52.33 acres if the latter needed any additional wells under either ground of exception to the field spacing rule. It was undisputed that said four Burford locations were each situated approximately 24 feet from the east line of said 52.33 acres, being the east line of the strip claimed by Burford, and the same distance from the west line of said strip; that there are three wells offsetting said 52.33 acres to the east, each located approximately 330 feet distant; that there are three wells on plaintiff's lease offsetting the west line of said strip, each located approximately 330 feet therefrom; that there are a total of seven wells on plaintiff's lease and a total of six wells on Magnolia Petroleum Company's lease on the east 50 acres of the Fuller 100 acre tract; that the west 52.33 acres of said Fuller tract is more densely drilled, and under the Commission's proration order is allowed to produce more oil per acre per day than said Magnolia Petroleum Company's 50 acre lease. There was no testimony showing or tending to show that any additional wells are necessary to be drilled on the west 52.33 acres of the Fuller tract in order reasonably to protect same from drainage by wells on the east 50 acres of said tract, or showing that said west 52.33 acres at the time of said hearings was not reasonably protected by its existing wells from drainage by wells on the east 50 acres of said Fuller tract. Likewise, there was no testimony at said hearings that the drilling of said four Burford locations, or either of them, is necessary to protect said 52.33 acres from drainage by

wells on any other tract adjacent thereto, or that wells on any such other tracts were at such times draining oil from said 52.33 acres. Said Burford locations were applied for and granted as Wells Nos. 1, 2, 3 and 4 on 2.33 acres, not as the eighth through the eleventh wells on said 52.33 acres, and said permits are not sustainable on the latter theory, the Railroad Commission having made no such finding.

In its motion for rehearing dated June 22, 1939, plaintiff offered to pool its 50 acre lease with said strip, so that the owner of the leasehold estate in said strip would receive, without drilling any wells on the strip, a ratable share in the future production from the pooled property in proportion to the acreage contributed by him, less deduction in the same proportion for future drilling and operating expenses occurring after the pooling is consummated; and plaintiff here now repeats and again tenders said offer in open Court, so that no inequity will result from cancellation of the permits herein attacked.

It was admitted by applicant's witness at said hearings that the drilling of Burford's four locations on the 2.33 acres as applied for and subsequently granted would make necessary the drilling of approximately sixteen equidistant offset wells, and would bring about the drilling of a total of 17 wells on an area three times the width and 660 feet longer than said strip (extending 330 feet farther north and 330 feet farther south, a total area of approximaterly 10 acres); and it was undisputed that this would bring about a grouping of wells at closer distances than is provided in the field rules, an uneven spacing of wells in said area and that such condition under the Commission's proration order will cause uneven withdrawal of oil and tends to cause the creation of a low pressure area; and such conditions cause less recovery of oil and gas than even spacing of wells and even withdrawal of oil.

11.

Said orders granting Defendant Burford permit to drill and operate said locations was in violation of the conservation laws of Texas and the aforementioned valid rules and regulations of the Railroad Commission, and of the right of plaintiff herein, and should be annulled by judgment of this Court, having been arbitrarily entered by said Commission, there being no evidence, and no substantial evidence, introduced at the aforesaid hearings supporting the orders of said Commission granting said well locations, or either of them; and in that such orders permit Defendant Burford and X. Y. Z. Oil & Gas Company as his grantee, by drilling and operating said well locations, to take, drain and confiscate plaintiff's oil, as herein more fully shown, they deny plaintiff due process of law and equal protection of the law as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

12.

Each of said orders granting Defendant Burford permit for said four locations is unreasonable, discriminatory and unjust in fact in its operation against plaintiff, and is in violation of the conservation laws and rules of the State of Texas applicable to said land and field, and the constitutional rights of plaintiff, for the reasons set out hereinabove and because:

(a) Under the express provisions of the field spacing rule and under the law of the State of Texas, the 2.33 acres being too narrow to be drilled under said rule, the voluntary subdivision of same from the west 50 acres of the Fuller tract must be disregarded in administering the field spacing rule, and no right exists under said rule to develop said 2.33 acres as a separate tract, and under

the pooling offer made before said Commission and here made, said Burford and his grantee can receive his and its fair share of the production and the equivalent of the amount of recoverable oil in place under said 2.33 acres, without the separate development of said 2.33 acres. Under the conditions existing at the time of said hearings on the Burford application there were sufficient wells on plaintiff's lease to produce the equivalent of the recoverable oil under the west 52.33 acres of the Fuller tract, disregarding the subdivision, without drilling or operating either of said Burford locations. In the alternative, if said west 52.33 acres was not reasonably protected by existing wells from drainage by wells on other tracts, plaintiff shows said Burford locations 24 feet from the east line of said 52.33 acres are not proper or necessary for such purpose, and the granting of same for such purpose would be an abuse of discretion on the part of said Railroad Commission, because there exist other points on said west 52.33 acres, farther from adjacent wells and boundary lines, at which points any further wells necessary to protect the property as a whole could be drilled, which would force the drilling of fewer offset wells in close proximity and which would bring about a more even distribution of wells and more even withdrawal of oil than would result from the drilling and operation of said Burford locations, and which would consequently cause less waste of oil and gas and injury to the property than would result from said Burford locations.

(b) If said Burford locations are drilled and operated on said 2.33 acre tract, it will be necessary for plaintiff to drill four equidistant offsets to said locations in order to lessen drainage of oil and gas by Burford's wells from plaintiff's lease, and it reasonably appears and plaintiff so alleges that a total of 15 or 16 offsets will be required in similarly protecting all the adjacent leases. All of such offsets will be less than the minimum distances from other

wells and property lines required by the field spacing rule, which will cause a great concentration of drilling and more uneven spacing of wells and more uneven withdrawal of oil from the reservoir; that the drilling and operation of said Burford locations alone or in connection with such necessary offsets will cause a further lowering of reservoir pressure in such vicinity, which will cause oil and gas to be forced to such point from surrounding areas of higher pressure at a great sacrifice and loss of energy, and with the lowering of pressure gas wastage will start, and as the gas content is diminished the viscosity of the oil will increase, thereby leaving great quantities of oil in place in the sand which could be recovered except for such close grouping of producing wells, and will increase the fire hazard, and will thereby cause waste.

(c) Under the proration order of said Commission then in effect each of the wells on the Fuller tract was allowed to produce 20 barrels each producing day, by virtue of which plaintiff's 50 acre lease had a total daily allowable of approximately 140 barrels, being an average of, to-wit: 2.8 barrels per acre per day. Under said order each well drilled and operated by Burford or his grantee on said 2.33 acres would have an allowable of, to-wit: 20 barrels each producing day or an average of 8.58 barrels per acre for each well so drilled and operated, being a total of 34.33 barrels per acre per day for said 2.33 acres in the event four wells are drilled and operated thereon. If plaintiff then drilled four additional wells on its lease as offsets to said Burford locations, under the existing proration order said additional wells would each receive an allowable of 20 barrels per producing day, which would give plaintiff's lease an average allowable of 4.4 barrels per acre per day; that under said order Burford's average allowable production per acre per day with four wells would be 7.8 times as great, or 680% greater than plain-

tiff's allowable production per acre per day after it had drilled such offsets; that by reason of such conditions the drilling by plaintiff of offset wells to Burford's well locations would not protect plaintiff's property from drainage but would only lessen to some extent the drainage of oil from plaintiff's lease by Burford's wells, and the drilling and operation of said Burford location will enable Burford and his grantee to drain, produce and confiscate to his and its own use, and benefit large and inestimable quantities of oil and gas from plaintiff's lease. Under the law of the State of Texas plaintiff owns the oil and gas under its lease, but has no legal recourse for the value of oil and gas drained from its property. The granting to Burford of permit to drill and operate the four locations herein complained of causes a discrimination against plaintiff in favor of Burford, which said Railroad Commission had the power and duty to prevent, and being without reasonable basis in fact, in that one well on said strip would give same an advantage in drainage opportunity over all adjoining properties and particularly over plaintiff's property, said order discriminates in favor of said defendant and his grantee and against plaintiff, and denies plaintiff the equal protection of the law and deprives it of its property without due process of law as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

Since the filing of the Original Complaint herein, said Commission has amended its proration rule for said field, with the effect that the allowable of plaintiff's wells have been increased in amounts varying from 0.53 and 0.69 of a barrel per well for each producing day, and the allowables for wells on the 2.33 acres have also been increased in approximately the same amounts, but the comparative allowables and drainage advantage of one well and all four wells on said strip remain substantially as before.

(b) If there be any reasonable basis for granting Burford permit for four wells or any of them on the ground of properly developing and conserving the oil and gas reserves of the State of Texas, or on any other ground, which plaintiff does not admit but expressly denies, the order granting said permit is nevertheless unjust, unreasonable and discriminatory in fact as to plaintiff and denies it equal protection of the law and deprives it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States because said Railroad Commission had the power and duty coincident with the granting of such permit to adjust the allowable from wells on said 2.33 acres so that the total daily allowable therefrom would not exceed 2.33 100 of the total daily allowable production for the remaining and adjoining 100 acres of the Fuller tract as fixed by said Commission for each producing day, and such provision would enable defendant Burford and his grantee to produce, and only produce, his and its fair share of the oil in place in relation to the remainder of said Fuller tract, the per acre oil content of said 2.33 acres being substantially the same as the average per acre content of the remaining 100 acres of said Fuller tract. Said Railroad Commission has no legal right or authority, under the guise of conserving oil or gas to authorize or enable Defendant Burford to drain large quantities of oil from plaintiff's property when it had a way open to it to prevent such result; that by so adjusting the allowable, the injury to plaintiff from the drilling and operation of said four Burford locations would be materially less, and the orders of said Commission granting said Burford permit without at the same time making proper provision for the protection of plaintiff's property is arbitrary, unreasonable, unjust and discriminatory in fact and authorizes an unlawful taking of plaintiff's property for supposed public benefit, without

compensation to it, in violation of Section 17 of Article I of the Constitution of the State of Texas, and deprives plaintiff of equal protection of the law and takes its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

13.

In connection with the foregoing, plaintiff shows that the oil bearing sand in the East Texas Oil Field, in which the land herein described is situated, is a blanket sand, and said sand is of substantially uniform thickness, porosity, permeability and saturation under said 2.33 acre parcel of land and the surrounding area, including plaintiff's lease, except the sand becomes thicker west of the strip and thinner to the east, the 2.33 acres being underlaid with substantially the same amount of oil per acre as the average per acre content of the neighboring area. Under the producing sand along the westerly edge of the pool and underneath a greater portion of it is a head of salt water pressing laterally and vertically on the reservoir of sand containing oil and gas. The gas tends to expand and the combined water and gas pressure create a force or energy that extends throughout the pool or reservoir. The sand containing the oil and gas is porous. the gas in solution renders the oil less viscous and greatly facilitates its passage through the sands. When wells are drilled from the surface into the producing sand, areas of reduce pressure are created at the bottom of the wells and the gas pressure and water drive—which together form the reservoir energy of the pool—drive the oil and gas to the bottom of the wells and up through the wells to the surface. The oil and gas readily migrate through the sand from areas of higher pressure to areas of lowered pressure at the bottom of the wells, across and without reference to surface property lines.

Under the existing orders of the Railroad Commission at the dates of said permits the production from wells in the East Texas Field was limited according to potential productivity of each well. The allowable production from the well locations complained of and from other wells which will be required thereby was and will be substantially the same as the allowable for wells now producing in this area, under the proration order then existing and under the present order. No allowance was made under the then existing order for the surface area of the land on which a well was located, nor on account of sand thickness, nor for the amount of oil in place under the land of the owner of a well in fixing the allowable production for wells in the field and in determining the amount of oil the owner of a well should fairly be permitted to produce in order to enable him to recover through such well the amount of oil he had in place under his tract of land. Wells in said field and in the area of the Fuller tract are capable of efficiently draining oil and gas for distances in excess of 466 feet from the well bore.

14.

Plaintiff's lease is fully and reasonably developed for oil and gas by the wells situated thereon, but it will be necessary for plaintiff to drill and equip at least one additional well as an offset to each well drilled and operated on said 2.33 acres, at a minimum cost to plaintiff of approximately $10,000.00 for each of said additional wells. The drilling and operation of wells on said 2.33 acres and likewise such offsets thereto as are drilled and operated on the adjoining tracts, including plaintiff's tract, will cause plaintiff's flowing wells to become pumpers sooner than they otherwise would, which will increase the cost of operating same, and will cause waste

of oil and gas under plaintiff's lease, and will reduce the amount of oil plaintiff's wells would otherwise eventually recover from the sand underneath its lease, and the market value of plaintiff's lease will be depreciated thereby in an inestimable amount, and for all the injuries and damages herein alleged, including its loss through drainage to wells on the 2.33 acres which alone will far exceed the sum of $3,000.00, exclusive of interest and costs, plaintiff has nø adequate remedy at law, the exact extent of such damages being difficult, if not impossible, of accurate estimation and are irreparable and therefore plaintiff's only practical and adequate remedy is the injunctive relief herein prayed for.

15.

On April 4, 1939, prior to the commencement of any operations on the well locations on the 2.33 acres, plaintiff advised Burford by prepaid telegram that it would file with the Railroad Commission a motion for rehearing on his No. 2 location granted by the Railroad Commission's order of March 25, 1939. Said motion for rehearing was thereafter filed within the time permitted by rule of the Railroad Commission with respect to such matters. Prior to the determination of such motion plaintiff obtained information that Defendant Burford was moving certain materials on the ground preparatory to drilling said well location No. 2, and plaintiff promptly notified him by prepaid telegram that it would file suit to cancel said order; that said Burford had commenced drilling said location before the Railroad Commission granted plaintiff's motion for rehearing on said No. 2 well; that after said Commission entered its order dated June 2, 1939, granting Defendant Burford permit to drill four wells on said strip, plaintiff notified Burford on June 7, 1939, by prepaid telegram, and before any further opera-

tions were commenced or conducted on said strip, that plaintiff would appeal from said order, and thereafter duly posted in the United States Mail, properly addressed to said Burford at his residence address in Dallas, Texas, on June 22, 1939, a copy of the petition for cancellation of said permits and for alternative relief filed by plaintiff with the Railroad Commission on said date. Without awaiting the action of the Railroad Commission on plaintiff's last mentioned petition Defendant Burford has proceeded and is now proceeding with further operations on said locations; that plaintiff has not been guilty of laches but has acted with promptness and diligence in asserting its right to relief before said Railroad Commission, and after exhausting all opportunity of relief from said Commission has proceeded with due diligence in the filing of this complaint.

16.

X. Y. Z. Oil & Gas Company has acquired G. E. Burford's leasehold estate in the 2.33 acres and has proceeded with operations on, and is now operating, wells on said 2.33 acres under and by virtue of the orders granting permits herein complained of.

Wherefore, all defendants except X. Y. Z. Oil & Gas Company having been summoned, plaintiff prays that process issue requiring defendant X. Y. Z. Oil & Gas Company to appear and answer herein, and that on final hearing said orders of the Railroad Commission dated March 25, 1939, and June 2, 1939, granting Defendant Burford permit to drill well locations Nos. 1, 2, 3 and 4 on said 2.33 acres of the W. L. Fuller, et ux, tract in the D. Sanchez Survey, Gregg County, Texas, be set aside and adjudged wholly null and void, and that judgment be rendered herein denying Defendants Burford and X. Y. Z. Oil & Gas Company authority to drill and operate said locations, or any of them, for oil or gas. Plaintiff

further prays that Defendants Burford and X. Y. Z. Oil & Gas Company, and each of them, their agents, attorneys, employees, representatives and assigns be permanently enjoined from further drilling or attempting to drill each and either of said well locations and from further operating, producing or attempting to produce oil and or gas therefrom, and that the Railroad Commission of Texas be enjoined from authorizing pipe line connections to said wells from and after the date of such injunction. In the alternative plaintiff prays that Defendants Burford and X. Y. Z. Oil & Gas Company, and each of them, their agents, attorneys, employees, representatives and assigns be enjoined from producing oil or gas from said four wells and each of them until such time as the Railroad Commission of Texas shall, after due notice and holding of a hearing, enter an order so adjusting the allowable production of said locations that the total daily production from all wells drilled and operated on said 2.33 acres under said permit orders shall not bear a greater proportion to the total daily allowable fixed by said Commission for the wells on the remainder of the Fuller 100 acres than the oil reserves in place under said 2.33 acres bears to the oil reserves in place under the remainder of the Fuller 100 acre tract.

Plaintiff further prays for costs of suit and such other relief, special or general, as it may be justly entitled to receive.

T. L. FOSTER,
MARTIN A. ROW,

Dallas, Texas.

POWELL, WIRTZ, RAUHUT & GIDEON,
J. A. RAUHUT,
Attorneys for Plaintiff, Sun Oil Company.

Austin, Texas.

29 EXHIBIT "A".

State of Texas.

Railroad Commission of Texas.
Austin.

#1, 2, 3, 4, W. L. Fuller 2.33 acres, Dolores Sanches Survey, Gregg County, Texas.

Case No. 26,868.

Rule 37.

Applicant: G. E. Burford, 4436 Fairfax Avenue, Dallas, Texas.

The application of G. E. Burford for an exception under the provisions of Rule 37 coming on to be heard on the 31st day of January, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception and that same should be granted to prevent confiscation of property:

Now, therefore, it is Ordered that the application of G. E. Burford for an exception under the provisions of Rule 37, and a permit to drill well No. 2, W. L. Fuller lease containing 2.33 acres of land out of the Dolores Sánchez Survey in Gregg County, Texas, as shown by plat submitted is hereby approved and applicant is granted permission to drill well No. 2 to be spaced as follows:

489 feet south of location No. 1, or 819 feet south of the north line; midway between east and west lines of the lease.

It is further Ordered that wells Nos. 1, 3 and 4 are hereby denied.

Entered at Austin, Texas, on this the 25th day of March, 1939.

LON A. SMITH,
Chairman,
ERNEST O. THOMPSON,
Commissioner,
.....,
Commissioner.

Attest:
C. F. PETET,
Secretary.

The above and foregoing is a true and correct copy of an order of the Railroad Commission entered on the above date.

STANFORD PAYNE,
Chief Deputy Supervisor Oil and Gas Division.

30 EXHIBIT "B".

State of Texas.

Railroad Commission of Texas.
Austin.

#1, 2, 3, 4 W. L. Fuller 2.33 acs. D. Sanchez Sur., Gregg Co., Tex.

Case No. 26,869.

Applicant: G. E. Burford, 4436 Fairfax Ave., Dallas, Texas.

The application of G. E. Burford for an exception under the provisions of Rule 37 coming on to be heard on the

19th day of May, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception, and the same should be granted to prevent confiscation of property:

Now, therefore, it is Ordered that the application of G. E. Burford for an exception under the provisions of Rule 37, and a permit to drill wells =1, 2, 3, 4 W. L. Fuller 2.33 acre lease, D. Sanchez Survey, Gregg County, Texas, as shown by plat submitted, is hereby approved and applicant is granted permission to drill wells 1, 2, 3, 4 to be spaced as follows:

=1—330 feet S. of the N. line; midway between E and W lines.

=2—489 ft. S. of location =1; midway between E & W lines.

=3—489 ft. S of location =2; midway between E & W lines.

=4—330 ft. N of S. line; midway between E & W lines.

Entered at Austin, Texas, on this the 2nd day of June, 1939.

LON A. SMITH,
Chairman.

.....,
Commissioner.

JERRY SADLER,
Commissioner.

Attest:
C. F. PETET,
Secretary.

The above and foregoing is a true and correct copy of an order of the Commission on the above date.

STANFORD PAYNE,
Chief Deputy Supervisor.

Acknowledgment of Service.

The undersigned hereby acknowledge receipt of a copy of "Amended Original Bill of Complaint", by delivery in person, this 11th day of January, 1940.

GERALD C. MANN,
Attorney General of Texas,
JAMES P. HART,
Assistant Attorney General,
By EDGARD CALE,
Assistant Attorney General,
Attorneys for Defendants,
Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. S[illegible]r.
F. L. KUYKENDALL,
Attorney for Defendant, G. E. Burford.
DAN MOODY,
Attorney for Intervener, Magnolia Petroleum Company.

Filed 11th day of January, 1940.

INTERVENER MAGNOLIA PETROLEUM COMPANY'S AMENDED ORIGINAL BILL OF COMPLAINT.

32 (Title Omitted.)

To the Honorable Judge of said Court:

The Magnolia Petroleum Company, a private corporation, hereinafter called Intervener, with permission of the Court, files this its Amended Original Bill of Complaint as an Intervener against G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas and the members thereof, to-wit, Lon A. Smith, G. A. Sadler and E. O. Thompson, in their official capacities, herein called Defendants, and for cause of action respectfully shows:

I.

This is a civil suit arising under the first section of the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). The Intervener is a private corporation duly organized, existing and doing business under and by virtue of the laws of the State of Texas; G. E. Burford is a citizen of the State of Texas, residing in Dallas County, Texas; and the above named members of the Railroad Commission of Texas are citizens of Texas and reside in Travis County in that State; the Railroad Commission of Texas is an official board of the State of Texas, and permission to sue said board has been granted by Section 14, Chapter 76, Acts of the Forty-fourth Legislature of the State of Texas, Regular Session, page 189, as amended by Chapter 15, Acts of the Forty-fifth Legislature of the State of Texas, Regular Session, page 17; and X. Y. Z. Oil & Gas

Company is a corporation organized under the laws of Oklahoma, maintaining an office in Dallas County, Texas, whose president and agent for service is G. E. Burford of said County and State; that by reason of the facts alleged in Part 1 of the Amended Original Bill of Complaint filed herein by the Sun Oil Company, this Court has jurisdiction of this cause, and by reason of the Federal questions herein presented and of said statute this Court has further jurisdiction of the cause of action presented by this intervention.

II.

Intervener is the owner of the oil and gas leasehold estate and rights in the east 50 acres of the Fuller tract described in Part 3 of said Amended Original Bill of Complaint, under an oil and gas lease in the usual form that gives it the exclusive right to drill wells upon said land for and to produce and sell oil from the said land, and vests in it ownership of seven-eighths of the oil under said land. That Intervener has heretofore fully developed said tract of land for the production of oil and gas therefrom by drilling thereon six wells, and has, since 1931, been and now is producing oil therefrom.

III.

That Intervener is interested in the subject-matter of this cause and in the effort herein made to have canceled and held for naught the permit order of the Railroad Commission of Texas herein involved because the said order authorized wells to be drilled upon an alleged strip of land which adjoins the said land of this Intervener along its entire western edge, and any wells that may be drilled upon said alleged strip of land will drain oil from beneath Intervener's said land, being oil that

belongs to and would otherwise be produced by it, which drainage of oil can be minimized but not entirely prevented by the drilling by Intervener of an offset well, otherwise unnecessary, to each well drill on said strip, at a cost of over Ten Thousand Dollars ($10,000.00) for each well. That the drilling and operation of any well on said strip will further injure Intervener in that the operation thereof either with or without offsets thereto, will cause waste as herein alleged and will also cause earlier reduction in the pressure in the oil producing structure under Intervener's lease to the point where the gas will come out of solution in the oil therein, thus rendering the oil more viscous, and causing it to pass less readily through said structure, and causing the wells of Intervener to become pumping wells sooner than they otherwise would, increasing the expense of production of oil from said land by Intervener, and reducing the market value of its said lease.

IV.

Intervener adopts, with like effect as if herein copied, all allegations of the said Amended Original Bill of Complaint of the Sun Oil Company contained in Parts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of such Complaint.

V.

Intervener further shows that it joined the Plaintiff herein in filing the petition for rehearing, as alleged in Parts 5 and 10 of said Amended Original Bill of Complaint.

VI.

In amplification of Part 9 of said Bill of Complaint, Intervener shows that the application and plat filed by De-

fendant Burford with the Railroad Commission, upon which the well permits herein involved were granted, did not contain any statement, or intimation, that the said wells were necessary to prevent waste, and did not state or show any fact from which any such conclusion could be reached. Wherefore, Intervener says that the Railroad Commission of Texas had no jurisdiction to grant the said permits on the ground that they were necessary to prevent waste.

VII.

If all or any of said Burford wells herein involved are drilled and operated, it will be necessary for Intervener to drill an equidistant offset well to each, in order to lessen the drainage of oil caused thereby from Intervener's said land, which will result in a concentration of wells spaced much more closely than is provided in Rule 37 of the Railroad Commission of Texas, and in uneven spacing of wells and uneven withdrawal of oil from the producing structure, all of which will tend to injure the oil producing structure under Intervener's said land, to prevent production by Intervener of the full equivalent of the recoverable oil thereunder and to cause waste of the oil and gas therein. Under the proration orders of said Railroad Commission, each of the wells on Intervener's said land was, at the time said permit order was granted to Defendant Burford and has ever since been allowed to produce 20 barrels of oil each producing day, by virtue of which Intervener's 50-acre lease had a total daily allowable production of approximately 120 barrels or approximately 2.4 barrels of oil per acre. Under said orders, each well drilled and operated on said alleged 2.33-acre strip will have an allowable of 20 barrels for each producing day, or an average of 8.58 barrels of oil per acre for each well so drilled and operated, being a

total of 34.32 barrels of oil per acre per day for said alleged 2.33-acre strip in the event four wells are drilled and operated thereon. Even if Intervener drills four additional wells on its said 50-acre lease as offsets to said Burford locations, under the proration order in effect at the time said permit order was made, and since, the alleged strip will have a great advantage over Intervener in the production of oil, and will be enabled to drain large quantities of oil from beneath the Intervener's tract and to deprive Intervener thereof. This denies Intervener the equal protection of the law, and deprives it of its property without due process of law, as guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VIII.

Intervener's lease is fully and reasonably developed for the production of oil and gas by the six wells situated thereon at the time said permit order was made, and since; but it will be necessary for Intervener to drill and equip at least one additional well (otherwise unnecessary) as an offset to each well the Defendants Burford and X. Y. Z. Oil & Gas Company are permitted to drill and operate on said 2.33 acres, at a cost to Intervener of approximately Ten Thousand Dollars ($10,000.00) for each additional well. The operation of said wells, or any of them, on said 2.33 acres, with or without the drilling and operation of any offsets thereto, either by Plaintiff or Intervener or others, will cause Intervener's flowing wells to become pumpers sooner than they otherwise would, which will increase the cost of operating same and will cause waste under Intervener's lease and will reduce the amount of oil Intervener would otherwise eventually recover from the sands underneath its lease, and will reduce the market value of Intervener's lease.

For all the injuries and damages herein alleged, including its loss through drainage by said Defendants' wells which alone will far exceed the sum or value of $3,000.00, exclusive of interest and costs, Intervener has no adequate remedy at law; the exact extent of such damages being impossible of accurate ascertainment; said damages are irreparable and Intervener's only practicable and adequate remedy is the injunctive relief herein prayed for.

IX.

Intervener shows that the method adopted by the Railroad Commission in holding said hearing, as alleged in portions of said Amended Original Bill of Complaint herein adopted, has resulted in a denial of a full and proper hearing by said Commission; that the said Commission delegated to an examiner the duty of conducting the hearing, but reserved to itself the decision as to whether the permits should be granted or not; that it did not permit the said examiner to make any finding of fact or recommendation to it with regard to the facts shown by the evidence or as to the propriety of granting the permit; that no transcript or statement of the evidence submitted at said hearing was prepared and submitted to or considered by said Commission before making said permit order; that by reason of this procedure the Intervener has been denied its constitutional right under said section of said Fourteenth Amendment to the Constitution to have a full and proper hearing of said application by said Commission and to have the decision made by said Commission only after hearing all of the evidence. That the action of the Railroad Commission in granting the permit order herein involved, under the circumstances alleged in Part II of said Amended Original Bill of Complaint, denied to Intervener due process of law and the equal protection of the laws as guaranteed to it

by said section of said Fourteenth Amendment to the Constitution of the United States, and the said order, in all respects as alleged, and in view of all the facts pleaded herein and in said Amended Original Bill of Complaint herein adopted, is unreasonable, discriminatory and unjust in its operation as against Intervener, and is in violation of the conservation laws and violates the constitutional rights of Intervener, especially with respect to said section of the Fourteenth Amendment to the Constitution of the United States. That the act of said Railroad Commission in granting said permit without adjusting the allowable production from the wells to be drilled thereunder, as alleged in section (d) of Part 12 of said Amended Original Bill of Complaint, is, as to Intervener, arbitrary, unreasonable, unjust and discriminatory in effect, and authorizes an unlawful taking of Intervener's property without compensation and deprives it of the equal protection of the laws and of due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

X.

X. Y. Z Oil & Gas Company has acquired G. E. Burford's leasehold estate in the 2.33 acres here involved, and has proceeded with operations on, and is now operating, wells on said 2.33 acres under and by virtue of the orders granting permits herein complained of.

Wherefore, all Defendants except X. Y. Z. Oil & Gas Company having been summoned, Intervener prays that process issue requiring Defendant X. Y. Z. Oil & Gas Company to appear and answer herein, and Intervener further prays as does the Plaintiff in the said Amended Original Bill of Complaint heretofore filed herein, and further that mandatory injunction issued to Defendants Burford and X. Y. Z. Oil & Gas Company, ordering that

any well that may have been drilled under said permit order be plugged and effectively sealed in accordance with the rules of the Railroad Commission so as to prevent production of oil therefrom, and that it have judgment for costs and such other relief, general or special, as it may be justly entitled to receive.

DAN MOODY,
Attorney for Intervener, Magnolia Petroleum Company.

Austin, Texas.

Filed 15th day of January, 1940.

ANSWER OF THE DEFENDANT, G. E. BURFORD.

40 (Title Omitted.)

To the Honorable Judge of said Court:

First Defense.

The plaintiff has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter alleged in the complaint.

Second Defense.

The plaintiff fails to state a claim against defendant upon which relief can be granted.

Third Defense.

I.

Defendant admits the allegations contained in paragraph numbered 1 of plaintiff's bill of complaint.

II.

Defendant Burford admits the allegations contained in paragraph numbered 2 of plaintiff's bill of complaint.

III.

Defendant Burford says that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 3 of plaintiff's bill of complaint.

IV.

Defendant Burford admits the allegations contained in paragraph 4 of plaintiff's bill of complaint to the effect that on November 26, 1919, the Railroad Commission of Texas adopted Rule 37 regulating the spacing of oil and gas wells in Texas and providing for exceptions to said Rule. Said defendant admits that said Rule 37 was amended on the various dates as alleged in paragraph numbered 4 of plaintiff's bill of complaint.

V.

Defendant Burford denies the allegations contained in paragraph numbered 4 in plaintiff's bill of complaint to the effect that the Railroad Commission of Texas was without authority to grant an exception to Rule 37 only on the grounds stated in said Rule.

VI.

Defendant Burford admits that on May 29, 1934, Rule 37, as applied to the East Texas Field, was amended and was in effect at the time of the issuance of the permits

complained of by plaintiff. Def ndant alleges that on July 13, 1939, said Rule 37, as applied to the East Texas Field was further amended by the Railroad Commission of Texas effective on said date, a copy of which amendment is attached to the answers of the defendants, Lon A. Smith, G. A. Sadler, and E. O. Thompson, which amendment is hereby adopted and made a part of this answer with the same force and effect as if fully copied herein.

VII.

Defendant Burford denies that the amendment to Rule 37 adopted May 29, 1934, set out on page 6 of plaintiff's original bill of complaint was a valid and binding regulation as applied to this defendant at the time said permit was granted because,

(a) said amendment is arbitrary, discriminatory, and not based upon any public necessity therefore, and deprives this defendant and others similarly circumstanced of the opportunity to develop their property for oil and gas, irrespective of the causes for the subdivision of said property; and

(b) said amendment, even if valid, is not applicable to and cannot be enforced against this defendant for the reason that the 2.33 acre tract owned and operated by this defendant was cut off and subdivided from a tract of 102.33 acres on December 18, 1930, on which date the last 50 acres of said 102.33 acre tract was assigned to Claude Bell and R. A. Graddy and which 50 acres is now operated by Magnolia Petroleum Company, and on February 28, 1931, the west 50 acres of said 102.33 acres was assigned to plaintiff herein; that the subdivision of said 102.33 acres, out of which came the 2.33 acre tract, was made long before the amendment to Rule 37 was adopted

May 29, 1934; that to apply said amendment of May 29, 1934, to plaintiff's 2.33 acres would prevent this defendant from developing and operating his lease on said 2.33 acres according to the rules and regulations in effect, or purporting to have been in effect at the time said subdivision was made.

VIII.

Defendant Burford hereby adopts as a part of his answer, to the same effect as if fully copied herein, paragraphs numbered IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, of the answer filed herein by the defendants, The Railroad Commission of Texas, Lon A. Smith, G. A. Sadler, and E. O. Thompson.

IX.

Defendant Burford admits that he received several telegrams from the attorney for the plaintiff herein to the effect that motions for rehearing would be filed by plaintiff with the Railroad Company, and to the effect that plaintiff would file suit to cancel the permit to drill wells numbers 1, 2, 3, and 4 granted by the Commission on June 2, 1939, as alleged in paragraph numbered 15 of plaintiff's bill of complaint.

X.

This defendant admits that immediately after the Railroad Commission of Texas granted him the permit to drill the four wells on the 2.33 acre strip, he proceeded with the drilling of said wells and continuously pursued the drilling of same and completed the drilling of said four wells before this suit was filed; that about 50 days elapsed from the time said permits were granted until

this suit was filed; that this defendant has paid or has obligated himself to pay approximately $40,000.00 for the drilling of said four wells; that the plaintiff, by its delay in filing this suit, has been guilty of laches in permitting this defendant to expend said sum of $40,000.00 in the drilling of said wells, by reason of which action and conduct on the part of plaintiff, plaintiff should not now be heard to complain because said wells have been drilled.

Wherefore, premises considered, this defendant prays that plaintiff take nothing by its suit, and that this defendant go hence with his costs, and for such other and further relief to which he may be entitled.

(S.) F. L. KUYKENDALL,
Attorney for Defendant G. E. Burford.

Austin, Texas.
Filed 12th day of August, 1939.

ANSWER OF THE DEFENDANT, G. E. BURFORD, TO THE ORIGINAL BILL OF COMPLAINT OF INTERVENER, MAGNOLIA PETROLEUM COMPANY.

44 (Title Omitted.)

First Defense.

Intervener has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter alleged in the complaint.

Second Defense.

Intervener fails to state a claim against defendant upon which relief can be granted.

Third Defense.

I.

Defendant Burford admits that the Railroad Commission of Texas is an agency of the State government, organized and existing under the laws of the States of Texas, and that the defendants, Lon A. Smith, G. A. Sadler and E. O. Thompson, are the elected, qualified and acting members of the said Railroad Commission. Defendant denies that this Court has jurisdiction of this cause under and by virtue of the facts alleged in paragraph Numbered I of the original bill of complaint filed herein by the Sun Oil Company, and by reason of the Federal questions alleged to be presented in the original bill of complaint of intervener.

II.

Defendant Burford says that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Numbered III of intervener's original bill of complaint.

III.

In answer to paragraph Numbered III of intervener's original bill of complaint, defendant Burford adopts, with the same force and effect as if fully copied herein, the answer of the defendants, Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson, to intervener's original bill of complaint, as set out in paragraph Numbered III of said answer.

IV.

In answer to paragraph Numbered IV of intervener's original bill of complaint, the defendant Burford adopts,

with the same force and effect as if fully copied herein, the allegations of his original answer filed herein to the original bill of complaint filed by Sun Oil Company which allegations are set out in paragraphs Numbered 3, 4, 5, 6, 8, 9 and 10 of said answer.

V.

Defendant Burford denies that the amendment to Rule 37 adopted May 29, 1934, set out on page 6 of plaintiff's original bill of complaint was a valid and binding regulation as applied to this defendant at the time said permit was granted because,

(a) said amendment is arbitrary, discriminatory, and not based upon any public necessity therefor, and deprives this defendant and others similarly circumstanced of the opportunity to develop their property for oil and gas, irrespective of the causes for the subdivision of said property; and

(b) said amendment, even if valid, is not applicable to and cannot be enforced against this defendant for the reason that the 2.33 acre tract owned and operated by this defendant was cut off and subdivided from a tract of 102.33 acres on December 18, 1930, on which date the last 50 acres of said 102.33 acre tract was assigned to Claude Bell and R. A. Graddy and which 50 acres is now operated by Magnolia Petroleum Company, and on February 28, 1931, the west 50 acres of said 102.33 acres was assigned to plaintiff herein; that the subdivision of said 102.33 acres, out of which came the 2.33 acre tract, was made long before the amendment to Rule 37 was adopted May 29, 1934; that to apply said amendment of May 29, 1934, to plaintiff's 2.33 acres would prevent this defendant from developing and operating his lease on said 2.33

acres according to the rules and regulations in effect, or purporting to have been in effect at the time said subdivision was made; that said rule, if attempted to be enforced against defendant Burford, would be retroactive in its application and would be in violation of Article 1, Section 16. of of the Constitution of Texas, and would be in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

VI.

Defendant Burford says that he is without knowledge or information sufficient to form a belief as t the truth of the allegations contained in paragraph Numbered V of intervener's original bill of complaint.

VII.

Defendant Burford denies the allegations contained in paragraph Number VI of intervener's complaint.

VIII.

In answer to paragraph Numbered VII of intervener's original bill of complaint, the defendant Burford adopts, with the same force and effect as if fully copied herein, all of the allegations contained in paragraph Numbered VII of the answer filed herein to the intervener's original bill of complaint by the defendants, Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson.

IX.

In answer to paragraph Numbered VIII of intervener's original bill of complaint, the defendant adopts, with the

same force and effect as if fully copied herein, all of the allegations contained in paragraph Numbered VIII of the answer filed herein by the defendants, Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson; and in addition, defendant Burford alleges that intervener does not allege any facts showing or which tend to show that the drilling and producing of said wells by defendant Burford will deprive intervener of an equal opportunity with adjacent landowners to recover its fair share of the oil to which it might be entitled.

X.

Defendant Burford denies the allegations contained in paragraph Numbered IX in intervener's original bill of complaint.

Wherefore, premises considered, defendant Burford prays that plaintiffs take nothing by their suit, and that this defendant go hence with his costs and for such other and further relief to which he may be entitled.

(S.) F. L. KUYKENDALL,
Attorney for Defendant G. E. Burford.

Austin, Texas.

Filed 1st day of September, 1939.

ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, G. A. SADLER AND E. O. THOMPSON TO AMENDED COMPLAINT OF SUN OIL COMPANY.

49 (Title Omitted.)

To said Honorable Court:

First Defense.

The plaintiff has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said

complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter alleged in the complaint.

Second Defense.

The plaintiff fails to state a claim against defendant upon which relief can be granted.

Third Defense.

I.

Defendants admit that the Railroad Commissioner of Texas is a department and agency of the State government, organized and existing under the laws of the State of Texas and located at Austin, Travis County, Texas, and that defendants Lon A. Smith, G. A. Sadler and E. O. Thompson are the duly elected, qualified and acting Members of the Railroad Commission of Texas, are citizens of the State of Texas and that each has an official residence and resides in Austin, Texas, within the Austin Division of the Western District of Texas. Defendants deny that this is a case over which this Court has jurisdiction. As to the residue of the allegations contained in paragraph I of plaintiff's amended complaint, defendants say that they are without knowledge or information sufficient to form a belief as to the truth thereof.

II.

Defendants admit the allegations contained in paragraph 2 of plaintiff's amended complaint.

III.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of

the allegations contained in paragraph No. 3 of said amended complaint.

IV.

Defendants admit the allegations contained in paragraph No. 4 of the amended complaint with reference to the promulgation of Rule 37 and admit that said rule as amended on May 29, 1934, was in effect at the time of the issuance of the permit complained of. Defendants further say that on the 13th day of July, 1939, said rule as applied to the East Texas field was amended by order of the Railroad Commission of Texas of said date.

Defendants deny that portion of paragraph No. IV of plaintiff's complaint, found on page 7 thereof, wherein it is alleged as follows:

"Provided the particular property on which it is proposed to drill a well in exception to said rule has not been subdivided from other properties or created into a separate tract from adjoining properties for development purposes since November 26, 1919."

Defendants deny that portion of paragraph No. IV of plaintiff's complaint found on page 7 thereof, wherein it is alleged as follows:

"Under the law of the State of Texas the creation of a trip or tract of land too narrow to be drilled in compliance with said spacing rules, arising by assignment or subdivision of portions of an original leasehold estate in land does not create a right to an exception to either of the above mentioned spacing rules, and does not create a 'vested right' nor a necessity to drill in order to prevent 'confiscation of property' within the meaning of said terms as used in aforesaid rule."

V.

Defendants admit the allegations contained in paragraph 5 of the amended complaint.

VI.

Defendants admit that Magnolia Petroleum Company was awarded a final judgment in cause No. 54,769 in the District Court of Travis County, Texas, against the Railroad Commission of Texas, the members thereof and Mamie S. Hammonds, O. O. Hammonds and T. S. Schroeder, cancelling a permit issued by the Railroad Commission of Texas to Mamie S. Hammonds by order dated October 11, 1934, permitting the drilling of an oil and gas well on a strip covered by Burford's application at a point 412 feet from the north line and midway between east and west lines of said strip. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations to the effect that "since the entry of said judgment G. E. Burford claims to have acquired title by assignment through Mamie S. Hammonds, O. O. Hammons and T. S. Schroeder, the oil and gas leasehold estate in said strip, and they are the source of such title as he has." Defendants deny that by reason of said judgment the Railroad Commission has no jurisdiction or authority to grant a permit for the drilling of each or either of the locations applied for by defendant Burford in that there existed at the time of the hearing of Burford's application no such change of conditions occurring since such judgment as would entitle said strip to a permit for either of said locations. Defendants say that none of the locations for wells Numbers 1, 2, 3, and 4 for which permits have been granted are situated at or upon the same location as the well permit issued to Mamie S. Hammonds, and on which

suit was brought in cause No. 54,759 in the District Court of Travis County, Texas, and that the judgment therein rendered could have no bearing upon the validity of the permits attacked in this cause of action. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation to the effect that no additional wells have been drilled since the date of said judgment offsetting the northern part of said strip on which is situated the well location for which permit was canceled by said judgment. Defendants deny that the existing reservoir conditions under said strip are the same and bear the same relation to reservoir conditions in the field generally as at the date of said judgment and date of permit thereby canceled; and that each of the Burford locations is no more necessary as an exception to the spacing rule in said field than the location for which permit was canceled in said judgment, and the drilling of wells on said strip was no more necessary to prevent waste of oil and gas at the date of the several hearings on Burford's applications than at the date of said judgment or at the date of said prior permit.

VII.

Defendants admit the allegations contained in paragraph No. 7 of the amended complaint to the effect that there was then pending in the District Court of Travis County cause No. 53,915, styled Sun Oil Company vs. Railroad Commission, et al, in which suit there is in issue the authority of the Railroad Commission of Texas to grant a permit in exception to the field spacing rules permitting the drilling of a well for oil or gas at the identical location as Burford's location No. 1, and that in said suit the issue is raised that said location is not necessary under either ground of exception to said rule, and that because of its size and the fact of subdivision it

is not entitled to be developed as a separate tract under said rule, said suit being in the nature of an appeal from an order of the Railroad Commission of Texas dated February 1, 1934, granting Mamie S. Hammond special permit to drill said well location in exception to the field spacing rule. Defendant denies that because of the pendency of said suit said Railroad Commission had no jurisdiction to grant defendant Burford a permit to drill his well location No. 1 or any other location on this land and that its order granting Burford's application for permit are illegal and void; because defendants say that on the 17th day of July, 1934, in said cause No. 53,915 in the District Court of Travis County, Texas, there was had a hearing on temporary injunction in the above set out and designated matter, designated cause No. 53,915 in the District Court of Travis County, Texas, and that on said date said Court granted an order restraining Mamie S. Hammonds from drilling her said location No. 1, on the tract in question, and held that her permit was invalid because said permit was issued without notice to adjacent lessees and without hearing thereon. The order granting the injunction expressly stipulated that said injunction was issued without prejudice to the rights of Mamie S. Hammonds to re-apply to the Railroad Commission of Texas for a new permit. Subsequent to the Court's judgment no further hearing has ever been had in said cause. Defendants further allege that in said cause of action to cancel said permit No. 1 and in the petition for injunction no affirmative relief against the Railroad Commission of Texas was asked for, and that no such affirmative relief has ever been granted. Defendants further say that since no motion, notice or hearing was had prior to entry of the order of February 1, 1931, granting Mamie S. Hammonds a permit to drill her said well No. 1, the Railroad Commission was without jurisdiction to try or determine any issue of fact at the hear-

ing upon which said permit was granted. Therefore it accordingly follows that if the Railroad Commission of Texas did not have jurisdiction to try such issue, the Court obtained none by appeal from the orders of the Railroad Commission. Magnolia Petroleum Co. vs. New Process Company, 104 S. W. (2d) 1006 at page 1109.

VIII.

Defendants deny that by reason of the procedure at the hearings before the Railroad Commission upon Burford's applications for wells Numbers 1, 2, 3 and 4, plaintiff has been denied a full and proper hearing by said Commission or that said plaintiff will be deprived of its property without due process of law guaranteed it by the 14th Amendment to the Constitution of the United States.

X.

Defendants deny those allegations in paragraph No. 9 of plaintiff's amended complaint, wherein it is alleged that said testimony so objected to was inadmissible and does not constitute substantial evidence that the drilling of said Burford wells is necessary to prevent waste within the meaning of said field rules. Defendants deny the allegations of paragraph No. 9 of said plaintiff's petition to the effect that said Commission did not make and file separate findings of fact in connection with said Burford application, and the only finding made by said Commission is the finding contained in this order attached hereto as Exhibit "A" and Exhibit "B" to the effect that said four locations are necessary to prevent confiscation of property. Defendants deny the allegations to the effect that the order granting said permits is not sustainable on the ground of necessity to prevent waste. Defendants deny that the order attacked by plaintiff would permit

a taking of plaintiff's property without compensation and without due process of law.

X.

Defendants deny that there was no evidence and no substantial evidence that the drilling of said four locations is necessary to enable Burford to produce an amount of oil equal to the amount of recoverable oil underneath said 2.33 acre strip or negativing undisputed testimony at said hearing that one well on said strip under the proration orders of the Railroad Commission will produce approximately three times as fast in proportion to its underlying reserves as the adjacent portions of the Fuller tract, and will ultimately produce in excess of the equivalent of the recoverable oil under the strip, and four wells would give said strip an undue advantage in draining opportunity over such adjacent portions; or that, disregarding the subdivision of said 2.33 acre strip from the Fuller 50 acre lease the entire area of 52.33 acres needed permits for four additional wells, or that the four locations granted would be the proper locations to be granted on said 52.33 acres if the latter needed any additional wells under either ground of exception to the field spacing rule. Defendants admit that said Burford locations were each situated approximately 24 feet from the east line of said 52.33 acres, being the east line of the strip claimed by Burford, and the same distance from the west line of said strip; that there are three wells offsetting said 52.33 acres to the east, each located approximately 330 feet distant. Defendants say they are without knowledge or information sufficient to form a belief as to the truth of the allegations to the effect that there are a total of seven wells on plaintiff's lease and a total of six wells on Magnolia Petroleum Company's lease on the east fifty acres of the Fuller 100 acre tract; that the west

52.33 acres of said Fuller tract is more densely drilled, and under the Commission's proration order is allowed to produce more oil per acre per day than said Magnolia Petroleum Company's 50 acre lease. Defendants deny that there was no testimony showing or tending to show that any additional wells are necessary to be drilled on the west 52.33 acres of the Fuller trace in order to reasonably protect same from drainage by wells on the east fifty acres of said tract, or showing that said west 52.33 acres at the time of said hearing was not reasonably protected by its existing wells from drainage by wells on the east fifty acres of said Fuller tract. Defendants further deny that there was no testimony at said hearing that the drilling of said Burford locations or either of them is necessary to protect said 52.33 acres from drainage by wells on any other tract adjacent thereto, or that wells on any such other tract were at that time draining oil from said 52.33 acres. Defendants admit that after the hearing had been held, and after the permit granting the four wells had been issued, that said plaintiff in its motion for a rehearing offered to pool its said tract with that of the defendant G. E. Burford, but said defendants say that there is no provision in the laws of the State of Texas requiring a fee owner or leasehold owner to pool his tract with another tract of land in order to produce the oil and gas thereunder, but that Article 6014 (g), Revised Civil Statutes of Texas, 1925, expressly provides "* * * it is not the intent of this act to require * * * that the separately owned properties in any pool be unitized under one management, control or ownership". Defendants deny that no inequity would result from cancellation of the permit herein attacked because of the refusal of the permittee G. E. Burford to pool with plaintiff herein. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph X

of plaintiff's petition to the effect that the drilling of Burford's four locations on his 2.33 acres as applied for and subsequently granted will make necessary the drilling of approximately sixteen equi-distant offset wells, and would bring about the drilling of a total of seventeen wells on an area three times the width and 660 feet longer than said strip (extending 330 feet further north and 330 feet further south, a total area of approximately ten acres). Defendants deny that it was undisputed that this would bring about a grouping of wells at closer distances than is provided in the field rules, and uneven spacing of wells in this said area, and that such conditions under the Commission's proration order will cause uneven withdrawal of oil and tend to cause the creation of a low pressure area; and such condition would cause less recovery of oil and gas than even spacing of wells under an even withdrawal of oil.

XI.

Defendants deny the allegations contained in paragraph 11 of the amended complaint.

XII.

Defendants deny the allegations contained in paragraph 12 of the amended complaint.

XIII.

Defendants admit in general the allegation contained in the first paragraph of paragraph 13 of plaintiff's amended complaint, found on page 21 thereof. Defendants further admit that under the order of the Railroad Commission in force at the time of granting said permits production from wells in the East Texas field was limited

according to the potential productivity of each well. Defendants further deny that the wells in said field and in the area of the Fuller tract are capable of efficiently draining oil and gas for distances in excess of 466 feet from the well bore.

XIV.

Defendants deny the allegations contained in paragraph 14 of plaintiff's amended complaint.

XV.

Defendants say they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of plaintiff's amended complaint.

XVI.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of plaintiff's amended complaint.

Wherefore, defendants pray that they go hence with their costs, without day, and for such other and further relief as they may be entitled to receive.

GERALD C. MANN,
Attorney General of Texas,
EDGAR W. CALE,
Assistant Attorney General,
JAMFS P. HART,
Assistant Attorney General,
Attorneys for Defendants Railroad Commission of Texas, Don A. Smith, E. O. Thompson and G. A. Sadler.

Acknowledgment of Service.

Service of the foregoing answer by delivery of a copy thereof to the undersigned is acknowledged this .... day of January, 1940.

....,
Attorney for Plaintiff, Sun Oil Company.

....,
Attorney for Intervener, Magnolia Petroleum Company.

....,
Attorney for Defendant, G. E. Burford.

Filed 20th day of January, 1940.

AMENDMENT TO ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, G. A. SADLER AND E. O. THOMPSON TO AMENDED COMPLAINT OF SUN OIL COMPANY.

60 (Title Omitted.)

To said Honorable Court:

Now comes defendants, the Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson, Members of the Railroad Commission of Texas, and by written consent of plaintiff, Sun Oil Company, first had and obtained, amend their answer to the amended complaint of Sun Oil Company as follows:

I.

Amend Paragraph I under Third Defense in said answer by inserting before the last sentence in said paragraph the following:

Defendants specially deny that the matter in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3,000.00).

GERALD C. MANN,
Attorney General of Texas,
EDGAR W. CALE,
Assistant Attorney General,
JAMES P. HART,
Assistant Attorney General,
Attorneys for Defendants,
Railroad Commission of
Texas, Lon A. Smith,
Ernest O. Thompson and
G. A. Sadler.

Austin, Texas.

CONSENT OF FILING OF AMENDMENT AND ACKNOWLEDGMENT OF SERVICE THEREOF.

Consent is given to the filing of the foregoing amendment to the answer of defendants, Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler, and service of the foregoing amendment by delivery of a copy thereof to the undersigned is acknowledged this 10th day of June, 1940.

(S.) J. A. RAUHUT,
Attorney for Plaintiff, Sun Oil
Company.

Filed 10th day of June, 1940.

ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, G. A. SADLER AND E. O. THOMPSON TO THE AMENDED ORIGINAL BILL OF COMPLAINT FILED BY INTERVENER MAGNOLIA PETROLEUM COMPANY.

62 (Title Omitted.)

To said Honorable Court:

First Defense.

The intervener has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said amended complaint that there is a lack of jurisdiction in this said Honorable Court over the subject matter alleged in the amended complaint.

Second Defense.

The intervener fails to state a claim against defendants upon which relief can be granted.

Third Defense.

I.

Defendants admit that the Railroad Commission of Texas is a department and agency of the State government, organized and existing under the laws of the State of Texas located at Austin, Travis County, Texas, and that defendants Lon A. Smith, G. A. Sadler and E. O. Thompson are the duly elected, qualified and acting members of the Railroad Commission of Texas, are citizens of the State of Texas and that each has an official residence and resides in Austin, Texas, within the Austin Division of

the Western District of Texas; defendants deny that by reason of the facts alleged in part I of the amended original bill of complaint filed herein by the Sun Oil Company, this Court has jurisdiction of this cause, and by reason of the Federal questions alleged to be herein presented and of said statute this Court has further jurisdiction of the cause of action presented by this intervention. As to the residue of the allegations contained in paragraph I of intervener's amended complaint, defendants say that they are without knowledge or information sufficient to form a belief as to the truth thereof.

II.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the intervener's amended complaint.

III.

In answer to paragraph III of intervener's amended complaint, defendants say they are without knowledge or information sufficient to form a belief as to the truth of the allegations made in said paragraph III to the effect that the intervener is interested in the subject matter of this cause and in the effort herein made to cancel and hold for naught the permit order of the Railroad Commission of Texas herein involved. Further, defendants say they are without sufficient knowledge or information to form a belief as to the truth of the allegation to the effect that any wells that may be drilled upon said alleged strip of land will drain oil from intervener's said land, being oil that belongs to and would otherwise be produced by it which drainage of oil can be minimized but not entirely prevented by the drilling by intervener of an

off-set well, otherwise unnecessary to each well drilled on said strip at a cost of over $10,000.00 for each well. Defendants deny that the drilling and operation of any well on said strip will further injure intervener in that the operation thereof either with or without off-sets thereto will cause waste as herein alleged and will also cause earlier reduction in the pressure in the oil producing structure under intervener's lease to the point where the gas will come out of solution in the oil therein, thus rendering the oil more viscous and causing it to pass less readily through said structure, and causing the wells of intervener to become pumping wells sooner than they otherwise would, increasing the expense of production of oil from said land by intervener, and reducing the market value of its said lease. Defendants further say that even if the facts above stated were true, which is not admitted, but which is specifically denied, that said intervener would not be entitled to the relief prayed for, for the reason that intervener would not be entitled to the relief prayed for, for the reason that intervener has failed to exhaust all of its available administrative remedies, in that said intervener has wholly failed to allege that it has applied to the Railroad Commission of Texas for additional permit or permits to correct the alleged discriminations complained of, or for any other relief of whatsoever sort, kind, character or nature to correct the alleged discriminations complained of herein.

IV.

In answer to paragraph IV of intervener's amended complaint, defendant Railroad Commission adopts, with like effect as if herein copied, all allegations of its amended answer filed herein to the amended original bill of complaint of the Sun Oil Company contained in and under its third defense, designated paragraphs num-

bers III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV.

V.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph No. V of the intervener's amended complaint.

VI.

Defendants deny the allegations contained in paragraph No. VI of the intervener's amended complaint.

VII.

Defendants say that they are without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of the intervener's amended complaint wherein it is alleged, "If all or any of said Burford wells herein involved are drilled and operated, * * * will result in a concentration of wells spaced much more closely than is provided in Rule 37 of the Railroad Commission of Texas and in uneven spacing of wells and uneven withdrawal of oil from the producing structure, all of which will tend to injure the oil producing structure on the intervener's said land, to prevent production by intervener of the full equivalent of the recoverable oil thereunder, and to cause waste of the oil and gas therein". Defendants admit that portion of paragraph VII of intervener's amended complaint which read as follows: "Under the proration orders of said Railroad Commission, each of the wells on intervener's land was at the time said permit order was granted to defendant Burford and has ever since been

allowed to produce 20 barrels of oil each producing day, by virtue of which intervener's 50-acre lease has a total allowable production of approximately 120 barrels, approximately 2.4 barrels of oil per acre". In this connection defendants further allege that said intervener has neither applied to said Railroad Commission of Texas for an additional permit or permits to drill upon its said tract of land, nor has it alleged that it has been refused such relief to increase the density of drilling upon its said tract of land, whereby and as a result whereof, the total daily allowable upon its said 50 acres of land would be increased by an even withdrawal of the recoverable oil lying thereunder. Defendants admit that portion of paragraph VII of intervener's amended complaint, wherein it is alleged, "Defendant Burford on said alleged 2.33-acre strip will have an allowable of 20 barrels each producing day, or an average of 8.5 barrels of oil per acre from each well so drilled and operated, being a total of 34.32 barrels of oil per acre per day for said alleged 2.33-acre strip in the event four wells are drilled and operated thereon". Defendants deny that the intervener is being denied equal protection of the law, that said order deprives it of its property without due process of law as guaranteed to it by Section I of the Fourteenth Amendment of the Constitution of the United States, and further says that plaintiff has not exhausted its administrative remedies to correct the alleged discrimination complained of in that it has failed to allege that it has either applied to said Railroad Commission for an additional permit or permits to drill more wells or that it has been refused permit or permits to drill wells on its said tract or tracts, or that it has in any other manner or means asked for or been refused any other relief to correct the so-called discriminations which it is now complaining of.

VIII.

Defendants say they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII of the intervener's amended complaint wherein it is alleged: "Intervener's lease is fully and reasonably developed for the production of oil and gas by the six wells situated thereon at the time said permit order was made, and since; but it will be necessary for intervener to drill and equip one additional well (otherwise unnecessary) as an offset for each well defendant Burford is permitted to drill and operate on said 2.33 acres, at a cost to intervener of approximately $10,000.00 for each additional well". Defendants further say that the costs of drilling offsets is not a proper matter to be taken into consideration by this said Honorable Court in the contest of a ruling of the Railroad Commission of Texas. Defendants deny the allegation in paragraph VIII of intervener's amended complaint to the effect that, "The operation of said well, or any of them, by defendant Burford, with or without the drilling and operation of any off-sets thereto, either by plaintiff or intervener or others, will cause intervener's flowing wells to become pumpers sooner than they otherwise would, which will increase the cost of operating same and will cause waste on intervener's lease, and will reduce the amount of oil intervener would eventually recover from the sands underneath his lease and will reduce the market value of intervener's lease". Defendants further deny the allegations in paragraph VIII of said intervener's amended complaint wherein it is alleged: "For all the injuries and damages herein alleged, including the loss to the plaintiff by Burford's well, which alone will far exceed the sum or value of $3,000.00, exclusive of interest and costs, intervener has no adequate remedy at law; the exact extent of such damages being impossible

of accurate ascertainment; said damages are irreparable and intervener's only practicable and adequate remedy is the injunctive relief herein prayed for."

IX.

Defendants deny the allegations contained in paragraph IX of intervener's amended complaint.

X.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X of intervener's amended bill of complaint.

Wherefore, defendants pray that they go hence with their costs, without day, and for such other and further relief as they may be entitled to receive.

GERALD C. MANN,
Attorney General of Texas,
EDGAR W. CALE,
Assistant Attorney General,
JAMES P. HART,
Assistant Attorney General,
Attorneys for Defendants Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. Sadler.

Acknowledgment of Service.

Service of the foregoing answer by delivery of a copy thereof to undersigned is acknowledged this .... day of January, 1940.

....,
Attorney for Intervener, Magnolia Petroleum Company.

....,
Attorney for Plaintiff, Sun Oil Company.

....,
Attorney for Defendant, G. E. Burford.

Filed 20th day of January, 1940.

AMENDMENT TO ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, G. A. SADLER AND E. O. THOMPSON TO AMENDED BILL OF COMPLAINT OF MAGNOLIA PETROLEUM COMPANY.

69 (Title Omitted.)

To said Honorable Court:

Now come defendants, the Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson, Members of the Railroad Commission of Texas, and by written consent of intervener, Magnolia Petroleum Company, first had and obtained, amend their answer to the amended bill of complaint of Magnolia Petroleum Company as follows:

I.

Amend Paragraph I under Third Defense in said answer by inserting before the last sentence in said paragraph the following:

Defendants specially deny that the matter in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3000.00).

GERALD C. MANN,
Attorney General of Texas,
EDGAR W. CALE,
Assistant Attorney General,
JAMES P. HART,
Assistant Attorney General,
Attorneys for Defendants,
Railroad Commission of
Texas, Lon A. Smith,
Ernest O. Thompson and
G. A. Sadler.

Austin, Texas.

CONSENT OF FILING OF AMENDMENT AND ACKNOWLEDGMENT OF SERVICE THEREOF.

Consent is given to the filing of the foregoing amendment to the answer of defendants, Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler, and service of the foregoing amendment by delivery of a copy thereof to the undersigned is acknowledged this 10th day of June, 1940.

(S.) DAN MOODY,
Attorney for Intervener, Magnolia Petroleum Company.

Filed 10th day of June, 1940.

ANSWER OF DEFENDANT X. Y. Z. OIL & GAS COMPANY TO THE AMENDED COMPLAINT OF SUN OIL COMPANY.

71 (Title Omitted.)

To the Honorable Judge of said Court:

First Defense.

The plaintiff has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter alleged in the complaint.

Second Defense.

The plaintiff fails to state a claim against defendant upon which relief can be granted.

Third Defense.

I.

Defendant admits that the Railroad Commission of Texas is a department and agency of the State government, organized and existing under the laws of the State of Texas and located at Austin, Travis County, Texas, and that defendants Lon A. Smith, G. A. Sadler and E. O. Thompson are the duly elected, qualified and acting Members of the Railroad Commission of Texas, are citizens of the State of Texas and that each has an official residence and resides in Austin, Texas, within the Austin Division of the Western District of Texas. Defendant denies that this is a case over which this Court has jurisdiction. As to the residue of the allegations contained

in paragraph I of plaintiff's amended complaint, defendant says that it is without knowledge or information sufficient to form a belief as to the truth thereof.

II.

Defendant admits the allegations contained in paragraph 2 of plaintiff's amended complaint.

III.

Defendant admits the allegations contained in paragraph 3 of said amended complaint.

IV.

This defendant admits the allegations contained in paragraph 4 of said amended complaint to the effect that on November 26, 1919, the Railroad Commission of Texas adopted Rule 37 regulating the spacing of oil and gas wells in Texas and providing for the granting of exceptions to said rule. This defendant admits that said Rule 37 was amended on the various dates as alleged in said paragraph numbered 4. This defendant further says that said Rule 37 as applied to the East Texas field was amended by order of the Railroad Commission on July 13, 1939, a copy of which amendment is attached to the original answer of the defendants Lon A. Smith, G. A. Sadler, and E. O. Thompson, which amendment is hereby adopted and made a part of this answer with the same force and effect as if fully copied herein.

V.

This defendant denies that the amendment to Rule 37 adopted May 29, 1934, set out on Page 6 of plaintiff's

amended complaint, was a valid and binding regulation as applied to this defendant at the time said permits were granted, because,

(a) said amendment is arbitrary, discriminatory, and not based upon any public necessity therefor, and deprives this defendant and others similarly situated of the opportunity to develop their property for oil and gas, irrespective of the causes bringing about such subdivision; and

(b) said amendment, even if valid, is not applicable to and cannot be enforced against this defendant for the reason that the 2.33 acre tract owned and operated by this defendant was cut off and subdivided from a tract of 102.33 acres on December 18, 1930, on which date the last 50 acres of said 102.23 acre tract was assigned to Claude Bell and R. A. Graddy and which 50 acres is now operated by Magnolia Petroleum Company, and on February 26, 1931, the west 50 acres of said 102.33 acres was assigned to plaintiff herein; that the subdivision of said 102.33 acres, out of which came the 2.33 acre tract, was made long before the amendment to Rule 37 was adopted May 29, 1934; that to apply said amendment of May 29, 1934, to plaintiff's 2.33 acres would prevent this defendant from developing and operating its lease on said 2.33 acres according to the rules and regulations in effect, or purporting to have been in effect at the time said subdivision was made and would be in violation of Article 1, Section 16, of the Texas Constitution and of the Constitution of the United States.

VI.

This defendant admits the allegations contained in paragraph numbered 5 of said amended complaint.

VII.

This defendant admits that Magnolia Petroleum Company was awarded a final judgment in Cause No. 54,769 in the District Court of Travis County, Texas, cancelling a permit issued by the Railroad Commission of Texas to Mamie S. Hammonds on October 11, 1934, as set out on Page 9 of plaintiff's amended bill of complaint. This defendant admits that G. E. Burford acquired title to the oil and gas leasehold estate in said strip from Mamie S. Hammonds, O. O. Hammonds and T. S. Schroeder, and that this defendant has acquired from G. E. Burford by assignment title to the lease covering said strip of land. This defendant denies the allegations on Page 10 of plaintiff's amended bill of complaint wherein it is alleged that it was in issue in said case that said well was not necessary to be drilled and operated either for the purpose of preventing waste of oil and gas or for the purpose of protecting vested rights of the owner of the leasehold estate in said strip, and that by reason of the subdivision the strip was not entitled to be developed as a separate tract under the field spacing rule, and said issues were necessarily adjudicated in said judgment. Defendant further denies that by reason of said judgment the Railroad Commission had no jurisdiction or authority to grant a permit for the drilling of each or either of the locations applied for by defendant Burford in that there existed at the time of the hearings on Burford's application no such change of conditions occurring since said judgment as would entitle said strip to a permit for each or either of said locations. This defendant further says that the permit location involved in Cause No. 544,759, referred to in paragraph 6 of plaintiff's amended bill of complaint, is not the same as wells Nos. 1, 2, 3 and 4 or either of them involved in this cause.

VIII.

This defendant denies the allegations in paragraph 6 of said amended bill of complaint to the effect that the existing reservoir conditions under said strip are the same and bear the same relation to reservoir conditions in the field generally as at the date of said judgment and date of permit thereby canceled and that each of the Burford locations is no more necessary as an exception to the spacing rule in said field than the location for which permit was canceled in said judgment, and the drilling of lease on said strip was no more necessary to prevent waste of oil and gas at the dates of the several hearings on Burford's application than at the date of said judgment or at the date of said prior permit.

IX.

In answer to paragraph numbered 7 of plaintiff's amended bill of complaint this defendant hereby adopts as if fully copied herein paragraph numbered VII of the answer filed herein by the defendants, The Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson, to plaintiff's amended bill of complaint.

X.

This defendant denies that the proceedings before The Railroad Commission involving the application of G. E. Burford for a permit to drill wells Nos. 1, 2, 3 and 4 were illegal or unlawful, or denied to plaintiff a full and proper hearing by said Commission, or that by reason of such procedure plaintiff has been or will be deprived of its property without due process of law guaranteed it by the 14th Amendment to the Constitution of the United States.

XI.

In reply to paragraph numbered 9 of plaintiff's amended bill of complaint this defendant admits and says that in support of its application for permit to drill wells Nos. 1, 2, 3 and 4 on said strip G. E. Burford offered as a witness an experienced and well qualified petroleum engineer, who testified, in part, substantially as set out in said paragraph numbered 9 but that said petroleum engineer offered testimony showing that said permits were necessary both to prevent confiscation of property and to prevent waste.

Further answering the allegations of paragraph numbered 9 of plaintiff's amended bill of complaint this defendant adopts to the same force and effect as if fully copied herein paragraph numbered IX of the answer to plaintiff's amended bill of complaint filed herein by the defendants, The Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson.

This defendant further shows that at the time of the various hearings before The Railroad Commission of Texas, which resulted in the granting of the permit to drill said four wells, the applicant for said permits offered in evidence a map or plat showing the number of wells located on the 50 acre tract of plaintiff, the 50 acre tract of intervener Magnolia Petroleum Company, and the 2.33 acre tract of this defendant, and which map also showed the location of wells on acreage surrounding the above-mentioned three tracts; that said exhibit so offered at the hearing before the Railroad Commission shows there is no production adjoining the acreage involved herein on the east; that on the acreage six times the area of the above-mentioned three tracts of land totalling 102.33 acres and immediately surrounding said three tracts of land there was one well for

each 6.2 acres; that including the four wells granted in the permit involved herein, the density of the Fuller 102.33 acre tract would be one well per 6 acres, such acreage considered being an extra six times the size of said Fuller 102.33 acre tract; that such evidence was legal, competent, substantial and uncontroverted and clearly showed that even if the Fuller 102.33 acre tract should be considered as a whole four additional wells were needed on said 102.33 acre tract in order to make such tract have substantially the same density as the area six times the size of the Fuller tract and surrounding such said Fuller tract.

This defendant further shows that at said several hearings before the Railroad Commission the applicant for said permit offered legal, competent and substantial evidence which, if believed, not only justified but required the Railroad Commission of Texas to grant applicant a permit to drill said four wells in order to prevent the adjoining lease owners from confiscating the property to which this defendant was entitled by virtue of its ownership of said 2.33 acre tract, but also such legal, competent and substantial testimony, if believed, showed that such permit should have been granted to drill said four wells in order to prevent waste.

XII.

In reply to paragraph numbered 10 of plaintiff's amended bill of complaint this defendant adopts to the same effect as if fully copied herein paragraph numbered 10 of the answer filed herein by the defendants the Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson to plaintiff's amended bill of complaint.

XIII.

This defendant denies the allegations contained in paragraph numbered 11 of plaintiff's amended bill of compiaint.

XIV.

This defendant denies the allegations contained in paragraph numbered 12 of plaintiff's amended bill of complaint.

XV.

This defendant denies the allegations in paragraph 13 of plaintiff's amended bill of complaint to the effect that the oil bearing said in the East Texas oil field is a blanket sand and is of substantially uniform thickness, porosity, permeability and saturation under said 2.33 acre tract involved herein and the surrounding area, except the sand becomes thicker west of the strip and thinner to the east. As to the remainder of the allegations in the first paragraph of paragraph numbered 13 this defendant is without knowledge or information sufficient to form a belief as to the truth of such allegation. This defendant admits that under the order of the Railroad Commission in force at the time said permits were granted production from wells in the East Texas field was limited according to the potential productivity of each well. This defendant denies that wells in said field and in the area of the Fuller tract are capable of efficiently draining oil and gas for distances in excess of 466 feet from the well bore.

XVI.

This defendant denies the allegations contained in paragraph numbered 14 of plaintiff's amended bill of complaint.

XVII.

This defendant denies that it received several telegrams from the plaintiff advising it that plaintiff would

file suit to cancel the permit involved herein, but this defendant says that the defendant G. E. Burford received a telegram from the attorney for plaintiff that motions for rehearing would be filed with the Railroad Commission and that suit would be filed to cancel the permit to drill wells Nos. 1, 2, 3 and 4 granted by the Commission on June 2, 1939; that on the last day of the twenty day period allowed by the Railroad Commission for filing motions for rehearing plaintiff, through its attorney, did file a motion for rehearing.

XVIII.

This defendant admits that immediately after the Railroad Commission of Texas granted the permit involved herein to drill said wells Nos. 1, 2, 3 and 4, it proceeded with the drilling of said wells and continuously pursued the drilling of same and completed the drilling of said four wells before this suit was filed; that about 50 days elapsed from the time said permits were granted until this suit was filed; that this defendant has paid, or has obligated himself to pay, approximately $40,000.00 for the drilling of said wells; that there are outstanding against said wells at the time same were completed oil payments in the sum of $28,500.00. In this connection, this defendant says that the telegrams sent to G. E. Burford by the attorney for plaintiff, referred to in paragraph numbered 15 of plaintiff's amended bill of complaint, were not sufficient to apprise this defendant that a motion for a rehearing would be filed or suit be filed, and even if same might be considered notice they were given for the purpose of attempting by threats to prevent this defendant from entering upon said tract and drilling said wells; that waiting until the last day of the twenty day period to file a motion for a rehearing constituted an attempt to delay this defendant in drilling said wells; that plaintiff, through its agents and em-

ployees, knew that this defendant was proceeding with the drilling of said wells but sat by and failed and refused to take any action to enjoin this defendant from so drilling said wells, and because of such conduct on the part of plaintiff it has been guilty of laches and is now estopped to deny the validity of the permit granting this defendant the right to drill said four wells.

XIX.

This defendant admits the allegations contained in paragraph numbered 16 of plaintiff's amended bill of complaint.

Wherefore, premises considered, this defendant prays that plaintiff take nothing by its suit and that it go hence with its costs without day, and for such other and further relief to which it may be entitled.

(S.) EVERETT PETRY,

Tulsa, Oklahoma.

(S.) F. L. KUYKENDALL,

Attorneys for Defendant X. Y. Z. Oil and Gas Company.

Austin, Texas.

A copy of the foregoing answer of X. Y. Z. Oil & Gas Company was received by us on this the 3rd day of February, A. D. 1940.

(S.) J. A. RAUHUT,

Attorney for plaintiff, Sun Oil Company.

....,

Attorney for intervener, Magnolia Petroleum Company.

....,

Attorney for defendant, Railroad Commission of Texas.

Filed 5th day of February, 1940.

81 ANSWER OF DEFENDANT X. Y. Z. OIL & GAS COMPANY TO THE AMENDED COMPLAINT OF INTERVENER MAGNOLIA PETROLEUM COMPANY.

(Title Omitted.)

To the Honorable Judge of Said Court:

First Defense.

The plaintiff has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter alleged in the complaint.

Second Defense.

The plaintiff fails to state a claim against defendant upon which relief can be granted.

Third Defense.

I.

This defendant denies that by reason of the facts alleged in part I of the amended original bill of complaint filed herein by Sun Oil Company this Court has jurisdiction of this cause and by reason of the federal questions alleged to be presented herein and of said statute this Court has jurisdiction of the cause of action presented by this intervention, and this defendant further denies that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. This defendant admits the remaining allegations contained in paragraph numbered I of the amended bill of complaint of intervener.

II.

This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered II of the amended complaint of intervener.

III.

In answer to paragraph numbered III of the amended bill of complaint of intervener, this defendant adopts with the same force and effect as if herein set out, paragraph numbered III of the answer of the Railroad Commission of Texas to the amended bill of complaint of said intervener.

IV.

In answer to paragraph numbered IV of the amended complaint of intervener, this defendant hereby adopts with the same force and effect as if fully copied herein, its answer to the amended bill of complaint of Sun Oil Company as set out in such answer in paragraphs numbered III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII.

V.

In reply to the allegations in paragraph numbered V of intervener's amended original complaint, this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of such allegations.

VI.

This defendant denies the allegations contained in paragraph numbered VI of the amended complaint of intervener.

VII.

In reply to paragraph numbered VII of the amended complaint of intervener, this defendant denies the allegations in said paragraph that "Even if intervener drills four additional wells on its 50 acre lease as offsets to said Burford locations, under the proration order in effect at the time said permit order was made, and since, the alleged strip will have a great advantage over intervener in the production of oil, and will be enabled to drain large quantities of oil from beneath the intervener's tract and to deprive intervener thereof. This denies intervener the equal protection of the law and deprives it of its property without due process of law, as guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution of the United States."

This defendant says that it is without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of the intervener's amended complaint wherein it is alleged, "If all or any of said Burford wells herein involved are drilled and operated, * * * will result in a concentration of wells spaced much more closely than is provided in Rule 37 of the Railroad Commission of Texas and in uneven spacing of wells and uneven withdrawal of oil from the producing structure, all of which will tend to injure the oil producing structure on the intervener's said land, to prevent production by intervener of the full equivalent of the recoverable oil thereunder, and to cause waste of the oil and gas therein." Defendant admits that portion of paragraph VII of intervener's amended complaint which reads as follows: "Under the proration orders of said Railroad Commission, each of the wells on intervener's land was at the time said permit order was granted to defendant Burford and has ever since been allowed to produce 20 barrels of oil each pro-

ducing day, by virtue of which intervener's 50-acre lease has a total allowable production of approximately 120 barrels, approximately 2.4 barrels of oil per acre."

This defendant admits that portion of paragraph VII of intervener's amended complaint, wherein it is alleged, "Defendant Burford on said alleged 2.33-acre strip will have an allowable of 20 barrels each producing day, or an average of 8.58 barrels of oil per acre from each well so drilled and operated, being a total of 34.32 barrels of oil per acre per day for said alleged 2.33-acre strip in the event four wells are drilled and operated thereon."

This defendant further shows to the Court that intervener applied to the Railroad Commission of Texas for a permit to drill its well No. 7 at a point 22.3 feet from the east boundary line of this defendant's 2.33-acre lease and directly east of this defendant's well No. 2; that said application was numbered 28413 on the docket of the Railroad Commission of Texas; that said application came on for hearing on May 10, 1939 and was granted by an order of the Railroad Commission of Texas dated September 8, 1939.

This defendant further shows that said intervener made application to the Railroad Commission of Texas for a permit to drill its well No. 8 at a point 24.8 feet east of the east boundary line of this defendant's 2.33-acre tract and directly east of this defendant's well No. 1; that said hearing was set for July 10, 1939 but for some reason unknown to this defendant intervener, on July 10, 1939, withdrew said application.

This defendant says that the action of intervener in applying for permits to drill wells Nos. 7 and 8 constituted an intention on the part of intervener to exhaust

its administrative remedies, and that the failure of intervener to apply for additional permits to drill additional wells on its acreage, which additional wells intervener would be entitled to drill, constitutes a failure on the part of intervener to exhaust its administrative remedies.

VIII.

In reply to paragraph nmbered VIII of intervener's amended bill of complaint, this defendant adopts with the same force and effect as if fully copied herein, the answer of the Railroad Commission of Texas to paragraph numbered VIII of intervener's amended bill of complaint, as reflected by paragraph numbered VIII of said answer of the Railroad Commission.

IX.

This defendant denies the allegations contained in paragraph numbered IX of the amended bill of complaint of intervener.

X.

This defendant admits the allegations contained in paragraph numbered X of intervener's amended bill of complaint.

XI.

This defendant says that immediately after the Railroad Commission of Texas granted the permit involved herein to drill said wells Nos. 1, 2, 3 and 4, it proceeded with the drilling of said wells and continuously pursued and completed the drilling of same before this suit was filed; that about 60 days elapsed from the time said

permit was granted until intervener filed its application to intervene herein; that during said 60 day period intervener did not file suit to enjoin this defendant from drilling said lease; that this defendant has paid, or has obligated itself to pay, approximately $40,000.00 for the drilling and equipping of said wells; that at the time said wells were completed there were outstanding against said wells oil payments in approximate sum of $28,500.00. This defendant further says that intervener, through its agents and employees, knew that this defendant was proceeding with the drilling of said wells and permitted this defendant to expend said sums of money above named in the drilling of said wells, and that because of such conduct on the part of intervener it has been guilty of laches and is now, or should be, estopped to deny the validity of the permit granting this defendant the right to drill said four wells. This defendant further shows that at no time after said permit was granted on June 2, 1939 did this intervener advise this defendant, or the defendant G. E. Burford, that it has filed a motion for a rehearing with the Railroad Commission of Texas, or that it would file suit to cancel said permit if such permit was finally granted to G. E. Burford; that because of such conduct on the part of intervener, it is now and should be estopped to deny the validity of the permit involved herein.

Wherefore, this defendant prays that intervener take nothing by its suit and that this defendant go hence with its costs, and for such other relief to which it may be entitled.

(S.) EVERETT PETRY,

Tulsa, Oklahoma.

F. L. KUYKENDALL,
Attorneys for Defendant X. Y. Z. Oil & Gas Company.

Austin, Texas.

A copy of the foregoing answer of X. Y. Z. Oil & Gas Company was received by us on this the 6th day of February, A. D. 1940.

(S.) DAN MOODY,
Attorney for intervener, Magnolia Petroleum Company.

.....,
Attorney for defendant, Railroad Commission of Texas.

Filed 6th day of February, 1940.

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87 JUDGMENT.

In the District Court of the United States for the Western District of Texas, Austin Division.

Sun Oil Company, Plaintiff, and Magnolia Petroleum Company, Intervener,
vs. Civil Action No. 28.
G. E. Burford, The Railroad Commission of Texas, et al., Defendants.

This action came on for hearing on the 5th day of February, 1941, and came the plaintiff, the intervener, and the defendants, by their attorneys of record, and all parties announced ready for trial; whereupon the Court proceeded to hear evidence and argument of counsel, and on the 6th day of February, 1941, announced the opinion of the Court that the issues of law and fact are with the defendants.

It is therefore Ordered, Adjudged and Decreed by the Court that the plaintiff's complaint and the intervener's complaint are dismissed, and that the defendants do have

and recover of and from the plaintiff and the intervener their costs.

Done at Austin, Texas, this 7th day of February, 1941.

(S.) ROBERT J. McMILLAN,
Judge, District Court of the United States for the Western District of Texas.

Entered: Civ. Or. B., Vol. 1, p. 176.

Filed Feb. 7th, 1941.

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88 FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Title Omitted.)

Findings of Fact.

I.

By this section, plaintiff and intervener challenged the validity of an order of the Railroad Commission of Texas in Rule 37 case No. 26,868, dated the 2nd day of June, 1939, which granted the defendant, G. E. Burford permission to drill four wells on his W. R. Fuller 2.33 acre oil and gas lease in the D. Sanchez Survey, Gregg County, Texas, in the East Texas oil field. A copy of said order is attached to plaintiff's bill of complaint and marked Exhibit "B" thereto.

II.

The Court finds that the residences and citizenship of the respective parties plaintiff, intervener and parties

defendant herein are as alleged in plaintiff's bill of complaint and that the amount in controversy herein exceeds $3,000.00 exclusive of interest and costs.

III.

The Court finds that the ownership of the respective properties of the plaintiff, intervener, and defendant G. E. Burford are as described and set forth in plaintiff's bill of complaint.

IV.

The Court finds that the challenged order of the Railroad Commission was entered subsequent to a hearing held, after due notice, before an examiner of the Railroad Commission, on May 19, 1939; that prior to such hearing, two other hearings on the same matter had been held on August 15, 1938, and January 31, 1939, and that the testimony at such hearings had been transcribed and such transcripts were available to the Railroad Commission prior to May 19, 1939; that the evidence at the hearing of May 19, 1939, was cumulative of the evidence already heard at such two prior hearings; that, although the evidence at the hearing of May 19, 1939, was not transcribed at the time the Railroad Commission entered the challenged order on June 2, 1939, the Railroad Commission then had before it (in addition to the file containing all applications, motions, maps, documentary evidence introduced at such hearings, and the transcripts of the two prior hearings) the written memorandum of its examiner summarizing the testimony and the contentions of the parties at the hearing of May 19, 1939, and conferred with such examiner before entering said order of June 2, 1939; and that the evidence at the hearing of May 19, 1939, was transcribed on June 9, 1939, and was available to the Railroad Commission prior to its final

order of July 10, 1939, overruling the motion for rehearing of the plaintiff and the intervener. The Court therefore finds that the plaintiff and the intervener have failed to prove that the Railroad Commission did not give proper consideration to the evidence introduced at the hearings on the matter here involved or that the plaintiff and the intervener have been denied such a hearing as the law contemplates.

V.

The Court finds that, as far as the matter of res judicata is concerned, the conditions have so changed in the East Texas Oil Field and on the leases adjacent to defendant Burford's lease since the Railroad Commission of Texas granted Mamie S. Hammonds an exception under the provisions of Rule 37 to drill her Well No. 1 on the W. R. Fuller's 2.81 acres Sanchez survey, Gregg County, Texas, on the first day of February, 1934, for the purpose of protection of vested rights to the disadvantage of permittee's tract, that the judgment in Cause No. 54,679, in the 53rd District Court of Travis County, Texas, entitled Sun Oil Company, et al, vs. Mamie S. Hammonds, et al, does not make the validity of the permit in the case res judicata.

Conclusions of Law.

I.

The Court concludes that it has jurisdiction of the parties and of the subject matter of this action.

II.

The Court concludes that the challenged order of the Railroad Commission of Texas does not violate any of

the rights of the plaintiff or the intervener under the 14th amendment to the Constitution of the United States.

III.

The Court is of the opinion that the various matters of state law raised present no federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction.

It has heretofore been thought to be true that in a proper case, where jurisdiction rested either because of diversity or federal question, the Court would necessarily interpret and apply the state law where it applied to issues involved. However, there are expressions in the two Rowan & Nichols cases which seem to indicate that as to these conservation cases, the parties should be relegated to the state Courts. The Court very seriously doubts whether in one of these oil regulation cases the Federal Courts should attempt to interfere with the regular processes of the Commission in regulating these fields unless some condition is uncovered more extreme than those on which the Courts have heretofore felt warranted in acting. This seems to be the purport of the holding of the Supreme Court in the first Rowan & Nichols case where, in the last paragraph of the majority opinion, it is said:

"Plainly these are not issues for our arbitrament. The state was confronted with its general problem of proration and with the special relation to it of the small tracts in the particular configuration of the East Texas field. It has chosen to meet these problems through the day-to-day exertions of a body specially entrusted with the task because presumably competent to deal with it. In striking the balances that have to be struck with the complicated and subtle factors that must enter

into such judgments, the Commission has observed established procedure. If the history of proration is any guide, the present order is but one more item in a continuous series of adjustments. It is not for the Federal Courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."

In the second Rowan & Nichols case, the Supreme Court said:

" * * * In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state Courts. 311 U. S. ——."

See also the amendment to the first decision handed down on October 21, 1940, 61 Sup. Ct. Rep., p. 66.

Dated this 22nd day of February, 1941.

(S.) ROBERT J. McMILLAN,
United States District Judge.

Filed Feb. 22, 1941.

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92 PLAINTIFF'S AND INTERVENER'S OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REQUEST FOR MODIFICATION OF SAME AND FOR ADDITIONAL FINDINGS.

(Title Omitted.)

To the Honorable Judge of Said Court:

Plaintiff and intervener object and except to the Findings of Fact and Conclusions of Law filed herein on Feb-

ruary 22, 1941, and move that they be corrected and modified, and that additional Findings of Fact be made as herein stated and suggested:

1. Finding No. 1 fails to state that plaintiff and intervener also challenge the order dated March 25, 1939, granting Burford permit to drill well No. 1 on the same strip, copy of which order is attached to the complaint as Exhibit A. Burford's lease is improperly designated as "W. *R.* Fuller" and should be "W. L. Fuller," the same as plaintiff's and intervener's lessor.

2. Finding No. IV should be corrected by eliminating the statement that the evidence at the hearing of May 19, 1938, was cumulative of the evidence already heard at two prior hearings, and changing same to read that the evidence at that hearing was partly cumulative, but new and additional evidence was offered on points not covered by the testimony and evidence at the preceding hearings.

3. Finding No. IV should be corrected so as to state that the two other hearings on the same matter which had been held prior to the hearing on May 19, 1939, were before an examiner with no member of the Commission present.

4. Finding No. IV should be corrected so as to state, in addition to the fact that the evidence at the hearing of May 19, 1939, had not been transcribed at the time the Commission entered its order dated June 2, 1939, that the testimony offered at said hearing had neither been heard by nor read by or to the members of the Commission at the time they entered the order dated June 2, 1939.

5. Plaintiff and intervener object and except to the last sentence of Finding IV to the effect that plaintiff and intervener failed to prove that the Railroad Commission did not give proper consideration to the evidence introduced at the hearings or that they have been denied such a hearing as the law contemplates because the undisputed evidence shows that said Commission did not in a reasonable manner acquaint itself with the evidence offered at the hearings, nor perform their duty to weigh any conflicting evidence offered at said hearings, prior to entering the orders complained of, and that such orders are therefore arbitrary and void, and could not be made valid by a subsequent reading of the evidence, had the members of the Commission subsequently read same, there being no evidence that they did so in fact; that the fact that the Commission disposed of this case by considering same for a period estimated by witness Copeland to be fifteen to forty minutes, on an examiner's memorandum which was an incomplete and incorrect presentation of the case in material respects, is self-evident proof that they could not have properly and reasonably read, considered, and weighed the evidence offered at the two prior hearings, in view of the length of the transcripts and the nature of the testimony therein presented.

6. Finding No. V should be corrected by eliminating the statement therein that conditions have so changed since entry of judgment in Cause No. 54769 (the Findings erroneously refers to it as No. 54769) that such judgment is not *res adjudicata* affecting validity of the permit here involved; and should find that under the undisputed evidence there has been no material change of conditions since the entry of said judgment which would justify the granting of said permit to Burford, it being undisputed that the west 52.33 acres of the W. L. Fuller tract is as well or better protected from drainage and was more fully developed at the time the Burford permits

were granted than at the prior time when the judgment was entered in Cause No. 54769 and when the prior permit to Hammonds canceled in said suit was granted.

7. The Court is requested to find that the allegations in paragraph 3 of the Amended Complaint are true.

8. The Court is requested to find that the allegations in paragraph 4 of the Amended Complaint are true.

9. The Court is requested to find that the allegations in paragraph 5 of the Amended Complaint are true.

10. The Court is requested to find the facts on the creation of the 2.33 acres as a separate tract for development purposes, as follows: That W. L. Fuller, owner of a tract known and described as 100 acres, more or less, leased same in its entirety for oil and gas development purposes, and Mamie Hammonds, a subsequent holder of the entire lease, first assigned on December 18, 1930, the east 50 acres to persons who in turn assigned it to Magnolia Petroleum Company; that Mamie Hammonds thereafter assigned the west 50 acres to Sun Oil Company on February 28, 1931; that the Fuller tract actually contained 102.33 acres, hence after making the above mentioned assignments Mamie Hammonds still held the lease on the middle 2.33 acres, being the strip which, by mesne conveyances, was assigned thereafter to G. E. Burford and X. Y. Z. Oil & Gas Company; that the 2.33 acre tract first came into existence as a subdivided or separate tract for development purposes on February 28, 1931, at which time the spacing rule required wells to be spaced no less than 150 feet from property lines. The strip came into existence as a separate tract for development purposes when Mamie Hammonds assigned

the west 50 acres, retaining the strip, on February 28, 1931, and the strip is approximately 50 feet wide at the widest point and over 2000 feet long.

11. The Court is requested to find that the east 50 acres and the west 52.33 acres of the W. L. Fuller tract were each of such size and shape that they were capable of separate development in full compliance with the Railroad Commission's well spacing rule in existence at the time when they were created into separate tracts for development purposes, by wells located thereon at distances of 150 feet or more from their respective boundaries; that the 2.33 acre strip is of such size and shape that it is incapable of development by wells spaced thereon in compliance with the spacing rule in existence at the time it was created as a separate tract for development purposes by subdivision from the west 52.33 acres of the Fuller tract, in that the strip is so narrow that it is impossible to space wells thereon at distances of more than approximately 25 feet from its boundaries.

12. The Court is requested to find that since October 11, 1934, the date of the Mamie Hammonds permit which was canceled by final judgment in Cause No. 54769, there has been no change of conditions materially affecting the strip or the right to drill wells thereon. There have been no additional wells drilled since that date offsetting the north part of said strip on which the Mamie Hammonds well location was situated. The sand conditions in the area were the same when the Burford permit was granted as when the Hammonds permit was granted, and while the pressure in the area and in the field generally has decreased, the pressure conditions in this area continue to bear the same relation to the field generally as when the permit involved in Cause No. 54769 was granted. The Burford locations are no more necessary to be drilled than was the Hammonds location. At the date

of the Burford permits, the west 52.33 acres of the W. L. Fuller tract was as well, or better, protected from drainage and development standpoints than at the date of the Hammonds permit.

13. Plaintiff and intervener request that the Court to find that the allegations in paragraph 7 of the Amended Complaint are true.

14. The Court is requested to find that the allegations in paragraph 8 of the Amended Complaint are true.

15. The Court is requested to find that the permits involved in this suit were granted by the Railroad Commission under the exception clause "to prevent confiscation of property" and were not granted under the exception clause "to prevent waste" and that the Railroad Commission did not find that the wells in controversy are necessary to prevent waste.

16. The Court is requested to find that the undisputed evidence at the hearings before the Railroad Commission on Burford's application was to the effect that one well on the strip, under proration orders, will produce oil approximately three times as fast in proportion to underlying reserves as the adjacent portions of the Fuller tract, owned by plaintiff and intervener, and that one well will ultimately produce in excess of the recoverable oil under the 2.33 acre strip; that four wells on the strip give it a vast and undue advantage in drainage opportunity over such adjacent portions of the Fuller tract; and that such facts were also established by undisputed evidence on the trial.

17. The Court is requested to find that there was no evidence introduced at the hearings on Burford's appli-

cations for drilling permit showing that, disregarding the subdivision of the 2.33 acre strip from plaintiff's 50 acre Fuller lease, the entire area of 52.33 acres needed four additional wells, or any additional wells, or that the four locations granted would be proper locations if the west 52.33 acres of the Fuller tract needed any additional wells under either ground of exception to the spacing rule; that according to the undisputed evidence adduced on the trial, the west 52.33 acres of the Fuller tract did not need any additional wells to enable it to recover the equivalent of the recoverable oil in place thereunder, nor to protect same from drainage; that there was no testimony at the hearings before the Railroad Commission showing that the west 52.33 acres of the Fuller tract was not at that time reasonably protected by existing wells from drainage.

18. The Court is requested to find that in its motion for rehearing before the Railroad Commission, plaintiff and intervener offered to pool their respective leases with the 2.33 acre strip for development purposes in either of the following ways: (a) the 2.33 acres and plaintiff's adjoining Fuller lease, so that they may be developed as one entire tract; (b) the 2.33 acres and intervener's adjoining Fuller lease, so that they may be developed as one entire tract; (c) pool half of the strip with plaintiff's adjoining lease and half of the strip with intervener's adjoining lease: that under either of said methods the owner of the leasehold estate in the 2.33 acres would receive, without drilling any wells on the strip, his ratable share of the future production from the pooled property, in proportion to the acreage contributed by him, less deduction in the same proportion for future drilling and operating expenses occurring after the pooling is consummated; that plaintiff and intervener tendered said offer into Court so that no inequity would result from cancellation of the permits herein attacked.

19. The Court is requested to find that Burford's applications for permit were for wells Nos. 1 to 4, inclusive, on the 2.33 acre strip, not for wells Nos. 8 to 12, inclusive, on the west 52.33 acres of the Fuller tract. In other words, his applications were to drill wells on the 2.33 acres as a separate tract, and the notices of hearing issued by the Railroad Commission were sent only to the lessees adjoining the 2.33 acres, not to all the lessees adjoining the 52.33 acres. The question of whether the west 52.33 acres of the Fuller tract needed any additional wells under either ground of exception to the spacing rule was not presented to, heard, or decided by the Railroad Commission.

20. The Court is requested to find that under the Railroad Commission's proration order, each well in the area was allowed to produce 20 barrels per day, regardless of its spacing and regardless of the density of wells per acre. Four wells on 2.33 acres would give the strip an allowable equal to that enjoyed by approximately 25 acres of plaintiff's and intervener's respective leases. The Burford locations will drain large and inestimable quantities of oil from plaintiff's and intervener's respective leases, and will lessen the recovery of plaintiff and intervener, respectively, in an amount valued at at least $50,000, and plaintiff and intervener cannot present such drainage by drilling offset wells. If, in granting said Burford permit, the Railroad Commission had adjusted the allowable of the wells on the 2.33 acres in such a way that they would produce not exceeding 2.33/100ths of the total daily allowable production for the remaining and adjoining 100 acres of the Fuller tract as fixed by the Railroad Commission, such provision would have enabled G. E. Burford and his assignee, X Y Z Oil & Gas Company to produce, and only produce their fair share of the oil in place in relation to the remainder of the Fuller tract, the per-acre oil content of the 2.33 acres

being substantially the same as the average per-acre content of the remaining 100 acres of the Fuller tract, and by such an adjustment the injury to plaintiff and intervener which will result from the Burford wells on the 2.33 acres would have been materially lessened.

21. The Court is requested to find that the allegations in paragraph 13 of the Amended Complaint are true.

22. The Court is requested to find that the allegations in paragraph 14 of the Amended Complaint are true.

23. The Court is requested to find that the allegations in paragraph 15 of the Amended Complaint are true.

24. The Court is requested to find that the allegations in paragraph 16 of the Amended Complaint are true.

25. The Court is requested to find that the allegations in paragraph 9 of the Amended Complaint are true.

26. The Court is requested to find that there was no substantial evidence offered at the hearings on Burford's applications for permits supporting the permit orders herein complained of, and that same were arbitrarily entered.

27. Plaintiff and intervener object and except to Conclusion II for the reasons stated in paragraph 5 hereof and because plaintiff and intervener say the undisputed evidence establishes the facts which they request this Court to find in their favor, by paragraphs 14, 16, 18, 20, 25 and 26 hereof.

28. Plaintiff and intervener object and except to Conclusion III, because same is contrary to the law of Texas on the several points of State law raised by the pleadings and evidence and argued to the Court.

Wherefore, plaintiff and intervener pray that the Court correct and modify the Findings of Fact and Conclusions of Law and make additional findings as herein requested.

Respectfully submitted,
(S.) J. A. RAUHUT,
Attorney for Plaintiff.
(S.) GREENWOOD, MOODY & ROBERTSON,
Attorney for Intervener.

Filed May 5, 1941.

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101 ORDER OVERRULING OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW, etc.

(Title Omitted.)

This 5th day of May, A. D. 1941, came on to be considered Plaintiff's and Intervener's Objections to the Findings of Fact and Conclusions of Law and Request for Modification of Same and for Additional Findings, and being fully advised as to same, the Court is of the opinion same should be overruled;

It is Therefore Ordered that said Objections, Request for Modification and for Additional Findings be and the

same are hereby overruled, to which Plaintiff and Intervener duly except.

At San Antonic.

(S.) ROBERT J. McMILLAN,
Judge, District Court of the United States, Western District of Texas.

Entered: Civ. Or. B., Vol. 1, page 199.

Filed May 6, 1941.

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102 TRANSCRIPT OF EVIDENCE.

(Title Omitted.)

Be It Remembered that on this Wednesday, February 5, 1941, the above entitled and numbered cause came on for trial before the Honorable Robert J. McMillan, District Judge, Western District of Texas, at Austin, Texas, and continued from day to day to its conclusion; plaintiff being represented by John A. Rauhut, of Austin, Texas; the defendants G. E. Burford and X Y Z Oil & Gas Company being represented by Mr. F. L. Kuykendall, of Austin; the defendants State of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler, being represented by Mr. Jas. P. Hart and Mr. Edgar W. Cale, Assistants Attorney General, and the Intervener, Magnolia Petroleum Company, being represented by Mr. Dan Moody, of Austin Texas; and during said trial the following testimony was introduced and proceedings had in connection therewith:

Mr. Rauhut:

Shall we proceed, Your Honor?

The Court:
Yes, sir.

Mr. Rauhut:
First, Mr. Cale has agreed that there is a diversity of citizenship, and I would like to make sure that the other defendants likewise do.

Mr. Kuykendall:
Yes, sir.

The Court:
What do you say, Counsel for Mr. Burford?

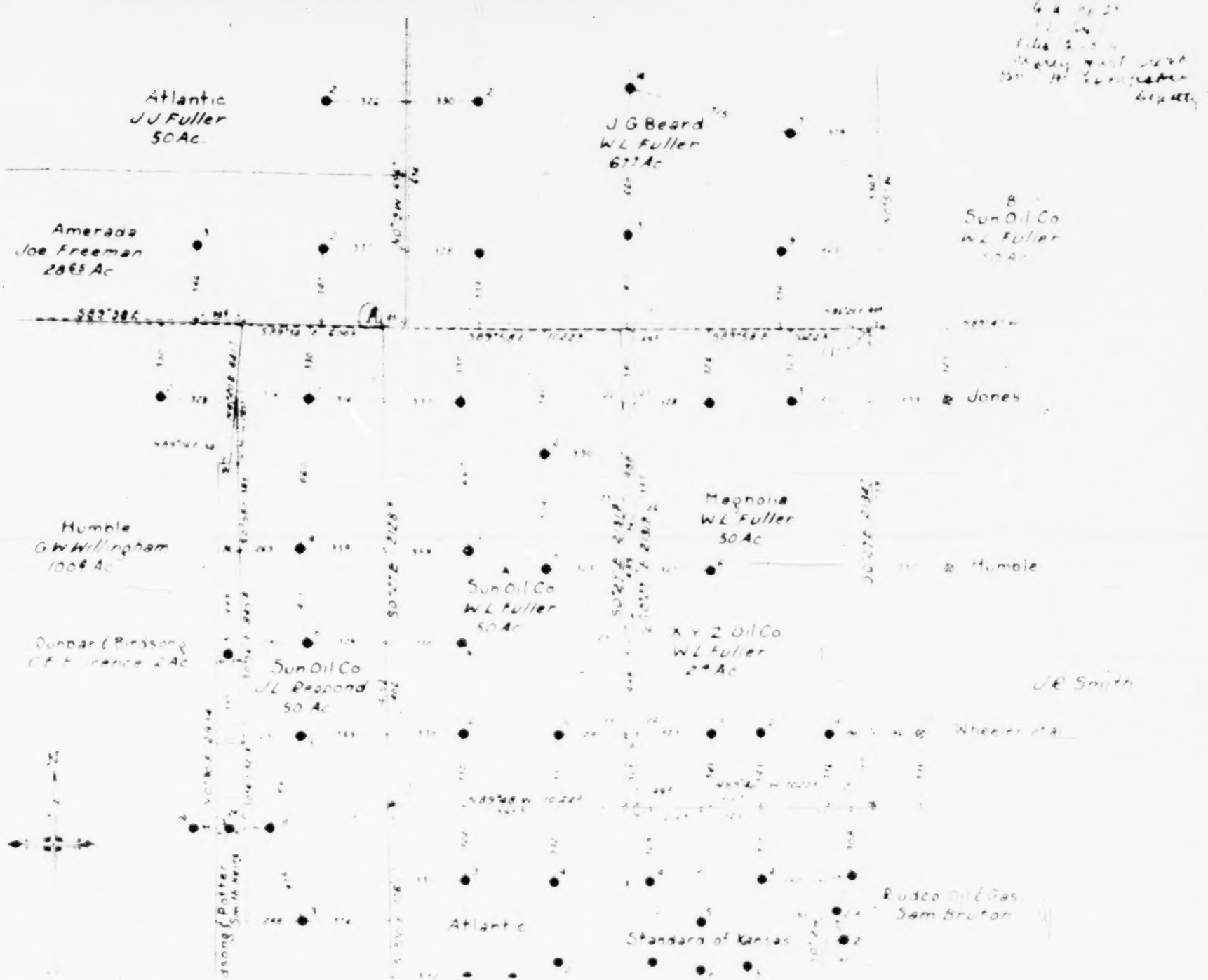
Mr. Kuykendall:
Yes, sir, we agree that there is a diversity of citizenship.

The Court:
The only question then is as to the amount in controversy.

103 PLAINTIFF'S EVIDENCE.

Mr. Rauhut:
We first offer in evidence a certified plat of this area, (it has been agreed that it may be done without further proof) showing that the conditions existing as of the date of the last hearing before the Railroad Commission, May 19, 1939.

(Thereupon the plat referred to above was marked for identification by the Reporter as Plaintiff's Exhibit No. 1, and copy of same appears at page 104 hereof.)


Atlantic
J J Fuller
50 Ac
J G Beard
W L Fuller
67.7 Ac
Amerada
Joe Freeman
28.63 Ac
Sun Oil Co
W L Fuller
50 Ac
Jones
Magnolia
W L Fuller
50 Ac
Humble
Humble
G W Willingham
100.6 Ac
Sun Oil Co
W L Fuller
50 Ac
X Y Z Oil Co
W L Fuller
2.9 Ac
Sun Oil Co
J L Redmond
50 Ac
J R Smith
Wheeler et al
Rudco Oil & Gas
Sam Bruton
Atlantic
Standard of Kansas
N

I Blair Dishman a Registered Professional Engineer, hereby certify that the above map, together with all notations, is true and correct and represents an actual survey made on the ground by me

Blair Dishman

Subscribed and sworn to before me this Ninth day of February, 1940.

Notary Public in and for Smith County, Texas

REGISTERED PROFESSIONAL ENGINEER AND LAND SURVEYOR No. 1 AUSTIN, TEXAS

MAP SHOWING

SUN OIL CO'S W L FULLER "A" LEASE
XYZ OIL CO'S W L FULLER LEASE
AND SURROUNDING AREA

AS OF MAY 19, 1939

D SANCHES SURVEY

GREGG COUNTY, TEXAS

SCALE 1 INCH = 400 FT

101

Mr. Rauhut:

Next, I want to offer in evidence a deed to W. L. Fuller, showing when he got title to the 100 acre, or the 102-1/3 acre tract that is shown on the map in the name of the Sun Oil Company, 50 acre W. L. Fuller lease and the 2-1/3 acre strip or 2 and four-tenths acre strip in the Magnolia 50 acres. This deed shows the date of November 15, 1908.

The Court:

That will be all right. Go ahead and put your proof in.

Mr. Rauhut:

All right, sir. We will substitute copies of these later.

The Court:

Yes, sir.

(Thereupon the deed referred to above was marked for identification by the Reporter as Plaintiff's Exhibit No. 2, and copy of same appears at page 105 hereof.)

105 PLAINTIFF'S EXHIBIT No. 2.

Deed.

Dated Nov 15, 1908.

Filed Jan 11, 1909.

Recorded Vol W, Page 312, Deed Records Gregg County, Texas.

W. E. Bledsoe Et Ux to Wm. L. Fuller.

The State of Texas,
County of Gregg.

Know all men by these presents; That we Willie Bledsoe and Nora Bledsoe, sole surviving heirs of J. E. Bledsoe Decd, of the County of Gregg and State of Texas

in consideration of the sum of Eight Hundred Dollars, to us in hand paid and to be paid by William L. Fuller of Gregg County, Texas, in the following manner to wit:

Two Hundred and Fifty Dollars cash in hand paid the receipt of which is hereby acknowledged and Two certain promissory notes of even date, herewith, each for the sum of Two Hundred and Seventy Five ($275.00) Dollars and due in One and Two years with interest at the rate of 8% interest from date until paid, have Granted, Sold and conveyed, and by these presents do Grant, Sell and Convey unto the said William L. Fuller of the County of Gregg and State of Texas all that certain described tract of land situated in Gregg County, Texas, a part of the Delores Sanches survey and beginning at a stake on the South line of the Alexander survey the N W corner of a 100 acre survey made for D. J. Harly from which a post oak bears S 19° W 22 varas a black jack bears N 8° W 17 varas.

Thence West at 731 varas the S W corner of M. Irwins survey and at 751-4/10 varas, a stake on the South boundary line of same.

Thence south 751-4/10 varas a stake on the West bank of a branch from which a maple bears S 77° E 7 varas. a sweet gum bears N 250° E 9 varas.

Thence E 751-4/10 varas to a large sweet gum in a branch for corner, from which a black gum bears N 8 varas.

Thence N 751-4/10 varas to the place of beginning, containing 100 acres of land.

The same being the tract of land conveyed to J. E. Bledsoe by Brown & Flewellen on the 11th day of

August 1896, and is recorded in Book O, Record of Deeds of Gregg County, Texas, on Page 590.

To have and to hold the above described premises, together with all and singular, the rights and appurtenances thereto in anywise belonging, unto the said William L. Fuller and his heirs and assigns forever.

And we do hereby bind ourselves, our heirs, executors and administrators to Warrant and Forever Defend, all and singular the said premises unto the said William L. Fuller and his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof. But it is expressly agreed and stipulated, that the vendors lien is retained against the above described note and all interest thereon are fully paid according to their face and tenor, effect and reading, when this deed shall become absolute.

Witness our hands at this 15th day of November A D 1908.

WILLIE E. BLEDSOE,
NORA E. BLEDSOE.

The State of Texas,
County of Tarrant.

Before me J. A. Leeman, Notary Public in and for Tarrant County, Texas, on this day personally appeared Willie E. Bledsoe, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this 8th day of Dec. A. D. 1908.

J. A. LEEMAN,
(L. S.) Notary Public, Tarrant County, Texas.

The State of Texas,
County of Navaro.

Before me B. L. Davis, a Notary Public in and for Navaro County, Texas on this day personally appeared Nora E. Bledsoe, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 19th day of Dec, 1908.

B. L. DAVIS,
(L. S.) Notary Public for Navaro County, Texas.

108 AGREEMENT.

Mr. Rauhut:

It is agreed by the parties that this deed conveyed to W. L. Fuller the land shown on Exhibit 1, totaling 102-1 3 or 1 4 acres shown on that map as Sun Oil Company's W. L. Fuller 50 acre lease, X Y Z Oil and Gas Company's W. L. Fuller 2.4 acre lease, and the Magnolia W. L. Fuller 50 acre lease.

The Court:

All right.

Mr. Rauhut:

Your Honor, I think we will stipulate something further here and I am going to state it here in the record, and they will correct me if there is anything that is incorrectly stated.

The Court:

Do you want to confer with counsel?

Mr. Rauhut:
Suppose I just dictate it to the Reporter, and then they can strike it out if it is not satisfactory.

The Court:
We will take about a five minute recess.

Mr. Rauhut:
All right, sir.

(Recess.)

The Court:
Are you ready, counsel?

Mr. Rauhut:
If the Court please, we have been making some stipulations. Would you like to have them read?

The Court:
Yes.

Mr. Rauhut:
All right.

(The following stipulation was thereupon read to the Court by the Reporter.)

109 STIPULATION.

All defendants agree to the facts alleged in Paragraph 3 of Sun Oil Company's Amended Complaint, down to but excluding the following at the end of said paragraph: "and by virtue thereof owns all the oil and gas and other minerals thereunder, subject to the payment of a one-eighth royalty on oil, and stipulated royalties on gas and

other minerals specified in its lease". However, it is agreed that plaintiff's interest under its lease is a seven-eighth interest under its lease is a seven-eighth interest in the minerals.

And it is further agreed that the 100 acres, more or less, and the west 50 and the east 50 that are referred to in that paragraph are between the corners marked "A", "B", "C", and "D" on Exhibit 1.

It is agreed by all parties that the Magnolia Petroleum Company is now the owner of a valid oil and gas lease, in the usual form, on the tract of land shown on the plat which has been introduced in evidence by the plaintiff, as Magnolia W. L. Fuller 50 acres, and that this was conveyed by the original lessee of the 102.33 acre tract to parties who conveyed it to the Magnolia Petroleum Company prior to the granting of the permit involved in this case; and it is agreed that this east 50 acres that is now under lease to the Magnolia Petroleum Company was assigned by the holder of the original lease of the 102.33 acre tract, approximately, to Bell and Graddy, who are the Magnolia's remote assignors, on December 18, 1930.

The Court:
All right, counsel.

Mr. Rauhut:
If the Court please, we desire to offer in evidence the Spacing Rule, or the original Spacing Rule of the Railroad Commission of Texas, and the amendments to the East Texas Field, showing the continuity of all the rules during all the periods that this strip was a separate tract.

The Court:
Is that Rule 37?

Mr.Rauhut:

Yes, sir. And it is agreed by all the parties, to save time, that the Reporter may copy these rules from the record in another case—that is, from the duplicate Statement of Facts in Cause No. 60,731, Humble Oil & Refining Company vs. Angue Spear et al., in the 53rd District Court of Texas. The November 26, 1919 rule is on page 110, and the East Texas amendments are copied on pages 160 through 189 of the Statement of Facts.

(Rule 37, of November 26, 1919, was received in evidence and marked for identification as Plaintiff's Exhibit No. 3,—same being here set out as follows):

111 PLAINTIFF'S EXHIBIT No. 3.

"Rule 37. No well for oil or gas shall hereafter be drilled nearer than three hundred (300) feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than one hundred and fifty (150) feet to any property line; provided that the Commission, in order to prevent waste or to protect vested rights, will grant exceptions permitting drilling within shorter distances than as above prescribed, upon application filed fully stating the facts, notice thereof having first been given to all adjacent lessees affected thereby.

Rule 37 shall not for the present be enforced within the proven oil fields of the Gulf Coast."

PLAINTIFF'S EXHIBIT No. 4.

Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Crude Petroleum Oil and Natural Gas in the East Texas Field.

Austin, Texas, September 2, 1931.

Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field Composed of Upshur, Smith, Rusk and Gregg Counties, Texas.

Whereas, the recently adjourned Special Session of the Forty-second Legislature enacted a comprehensive amendment to the oil and gas conservation laws of the State of Texas, re-defining "waste" of crude petroleum oil and natural gas and prescribing the powers of the Railroad Commission of Texas in preventing waste thereof; and

Whereas, immediately upon the adjournment of said First Called Session of the Forty-second Legislature this Railroad Commission promulgated an order directing that a special hearing should be held in the City of Austin, Texas, on the 25th day of August, 1931, to determine what field rules and regulations, if any, should be prescribed, to carry out the policies underlying the new legislation, in the so-called East Texas field, consisting of Upshur, Smith, Rusk and Gregg Counties, Texas. Pur-

suant to statutory notice, this hearing was held and evidence was offered tending to show that waste of crude petroleum oil and natural gas is now taking place or was taking place in said East Texas field as defined herein prior to and at the time of the shut-down of said field on or about the 17th day of August, 1931, and that waste of said oil and gas is threatened in said East Texas field in the respects hereinafter prescribed will prevent or tend to lessen the waste of said oil and gas in said field.

In the recently enacted legislation the Legislature of Texas has provided that waste shall not be construed to mean "economic waste"; and further that the Railroad Commission of Texas "shall not have power to attempt by order or otherwise directly or indirectly, to limit the production of oil to equal the existing market demand for oil". In view of this legislative mandate the Railroad Commission has deemed it improper to consider any evidence at the hearing which convened on August 25, 1931, and was concluded on August 28, 1931, dealing with economic conditions in and oil industry. Accordingly, at the hearing mentioned no evidence was heard or considered dealing with price or with the limitation of production with a view of stabilizing or raising the price of crude petroleum oil.

On consideration of all of the evidence adduced at said hearing the Railroad Commission of Texas is of the Opinion and so Finds and Orders that the following rules and regulations are reasonable and necessary and will prevent, or greatly minimize, the waste of crude petroleum oil and natural gas in the East Texas field.

1. That present producing areas and extensions thereof in the counties of Gregg, Upshur, Smith and Rusk, Texas, shall constitute and be known as the "East Texas field".

2. It appearing from the evidence that the spacing of wells in said East Texas field, under the terms and provisions of the Railroad Commission's oil and gas conservation Rule 37 threatens to cause actual physical waste due to the too rapid dissipation of gas energy in the production of oil and also due to the too rapid encroachment of water, that in the interest of preventing actual physical waste of oil and gas in said East Texas field, it is desirable to modify said Rule 37 as applied to said field. Therefore, it is here now ordered by the Railroad Commission that said Rule 37, insofar as it applies to the East Texas field, be modified and the following rule is provided: "No well for oil or gas shall hereafter be drilled nearer than 660 feet to any other completed or drilling well on the same or adjoining tracts of land and no well shall be drilled nearer than 330 feet to any property line; provided, that the Commission, in order to prevent waste and to protect vested rights, shall and will grant exceptions permitting drilling within shorter distance as above described upon application filed duly stating the facts, statutory notice thereof having first been given to all adjacent lessees or operators thereof; and provided further that this modification of Rule 37 shall not be applied against wells already begun or offsets thereto". It is not the intention of the Railroad Commission to repeal Rule 37 by this order, but only to provide a special rule applicable only in said East Texas field.

114 PLAINTIFF'S EXHIBIT No. 4-A.

Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field.

Austin, Texas, September 10, 1931.

Supplemental Order Amending Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field Composed of Upshur, Smith, Rusk and Gregg Counties, Texas.

Whereas, the Railroad Commission of Texas on September 2, 1931, adopted an order promulgating rules and regulations for the prevention of physical waste of crude petroleum oil and natural gas in what is known as the East Texas field composed of Upshur, Smith, Rusk and Gregg Counties, Texas, and among other rules adopted for that purpose was the modification of Rule 37 limiting the spacing of wells in said field; and

Whereas, it appears to said Commission that said rule should be further modified as a safeguard against physical waste due to the too rapid dissipation of gas energy in the production of oil in said field, and also to the rapid encroachment of water;

Therefore, It Is Hereby Ordered by the Railroad Commission of Texas that paragraph numbered two of said order of September 2, 1931, relating to the modification of Rule 37 be and the same is hereby amended by the addition of the following requirement:

After 12:01 P. M. Tuesday, September 15, 1931, not more than one well to each twenty (20) acres of surface ownership shall be drilled in said field and for the purpose of enforcing this order the deputy supervisor in charge of said field shall divide the same into 20-acre tracts and in doing so shall make such subdivision in such manner that the said 20-acre tracts shall not have length in excess of twice the width thereof. Such 20-acre tracts shall be known as units, and parts thereof shall be known as fractional units. No lease or property shall be divided in such manner as to create more than one fractional unit, and units and fractional units shall be calculated upon the basis of ownership as of the date hereof. New productive areas shall be divided into units and fractional units as the field may be extended. Fractional units shall be created only in case there shall be insufficient acreage in the lease or property of which the fractional unit is a part to create a full unit. Noncontiguous leases or properties shall be treated as separate tracts for the purpose of forming units and fractional units. For the purpose of the limitation of drilling described herein, each fractional unit shall be considered a full unit. The distances covering the spacing of wells provided for in the modification of Rule 37 as amended for the purpose of application in said field shall be considered minima, subject, however, to the granting of exception as provided for in this paragraph as originally adopted.

The limitation of one well to each full unit or fractional unit as provided for herein shall not apply to units

where more than one well has already been begun or where there are offset wells already begun or completed.

(Seal) RAILROAD COMMISSION OF TEXAS.
By C. V. TERRELL,
Chairman.
LON A. SMITH,
Member.
PAT M. NEFF,
Member.

Attest:
C. F. PETET,
Secretary.

116 PLAINTIFF'S EXHIBIT No. 4-B.

Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Oil and Natural Gas in the East Texas Field in Upshur, Gregg, Rusk and Smith Counties, Texas.

Austin, Texas, February 25, 1932.

Special Order Adopting Rules and Regulations Pursuant to Hearing February 12, 1932.

Pursuant to statutory notice, the Railroad Commission of Texas, hereafter referred to as the "Commission",

reopened the above cause on February 12, 1932, for the purpose of considering the adoption of rules and regulations for the prevention of waste of crude oil and natural gas in the East Texas field, composed of the producing areas and extensions thereof in Upshur, Gregg, Rusk and Smith Counties, Texas, and for the further purpose of adopting rules and regulations pertaining to the Common Carrier and Common Purchaser Laws of the State relating to crude oil and natural gas.

A similar hearing was held in said cause August 25, 1931, for the same purpose and an order was duly entered by the Commission September 2, 1931, adopting regulations for the spacing, completion and operation of wells in such manner as to prevent waste, for the establishment of a limit in the amount of oil and gas which might be produced from said field and the maximum ratio of oil to gas produced from any well therein, and for the purpose of conserving the gas energy in the field. The regulations were further designed to provide for the most efficient utilization of the water drive or hydrostatic pressure arising from the approach of water from the west side of the field, and to increase the ultimate recovery of oil from the producing sands. At the time of the hearing of August 25, 1931, engineers and operators in the field were not in possession of such complete data on the field as would enable them to bring to the Commission conclusive testimony as to what should be done with that degree of exactness experience with the field would suggest, but sufficient evidence was introduced to guide us in establishing regulations for the conduct of operations in the field in an orderly way which would conserve the oil and gas therein and we verily believe that the orders entered September 2, 1931, and at later dates, without doubt, served that useful purpose, and though perhaps not perfect, they were a material improvement over past operations when

the field was out of control. The evidence which formed the basis of those orders will be considered here and the findings of our order of September 2, 1931, as to the necessity for spacing and tubing of wells, limiting the penetration of the producing horizons, plugging back for salt water, the prevention of fire hazards, and the like, where appropriate, are here adopted for this order.

Since the hearing of our August 25, 1931, it is evident from the testimony taken at our recent hearing and from reports of our own agents, that much valuable information as to pressures, pressure declines, oil-gas ratios, the movement of the water table, and other engineering data has been accumulated and compiled so that the engineers were enabled to testify with more assurance and more conclusively at our hearing of February 12, 1932, as to what is going on underground in said field. From the testimony at that hearing, it appears clearly evident,—(a) that withdrawal of oil in the past has been too rapid as the mean bottom hole pressure has dropped from 1600 to about 1425, or approximately two pounds for every million barrels of oil produced, whereas under the orderly conservation program of production, under this Commission's orders, in the Yates Field in Pecos County, the decline in pressure has been, by comparison, during the past year about twenty-one pounds per square inch or six-tenths of one pound for each million barrels of oil produced; (b) that the reservoir energy of the East Texas Field has been dissipated at an excessive rate due to excessive and disproportionate withdrawals of oil from the field; (c) that reservoir pressures have not been maintained as effectively as they should be in order to prevent liberation of "free gas" and consequent high oil-gas ratios and resulting gas water; (d) that the two lifting agencies (gas energy and water drive) have not been properly conserved and coordinated, and in said field

there is a notable deficiency of gas, which fact demands not only the most effective plan of orderly production of oil to conserve gas energy but a proper use of the water drive by withdrawals of oil at such slow rates and under such conditions as will permit the water to come in and gradually and effectually displace the oil; (e) that the maximum ultimate recovery of oil per acre of the field has not been but can be attained only by the maintenance of an orderly, gradual oil production rate; (f) that maximum daily production should be limited to slightly in excess of three hundred thousand (300,000) barrels as a maximum, but that water intrusion or actual physical waste would be greatly minimized at a production rate for said field below three hundred thousand (300,000) barrels per day, such low rates being necessary for the orderly encroachment of water and consequent maximum ultimate yield of oil.

On careful consideration of all the evidence adduced at the hearings in this cause held on August 25, 1931, and February 12, 1932, before the Railroad Commission of Texas, the said Railroad Commission is of the opinion and so Finds and Orders that the following rules and regulations are reasonable and essential to the conservation of oil and gas and the prevention of physical waste thereof in the said East Texas Field, and that they will prevent, or greatly minimize, the waste of crude petroleum oil and natural gas, and will correct the unsatisfactory and wasteful condition hereinbefore referred to.

Rule 1. (a) Rule 37, adopted November 26, 1919, is hereby amended insofar as it applies to the East Texas Field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than Six Hundred and Sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled

for oil or gas at any point less than Three hundred and Thirty (330) feet from any property or division line; provided, however, the Commission, in order to prevent waste or to protect vested rights, will, after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing, notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing."

(b) Any owner or owners of an oil, gas or mineral lease, covering a tract or tracts of land of the same fee title of Twenty (20) acres or less, shall not drill more than one (1) well for oil or gas on said tract or tracts of land, and such well shall be properly spaced according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof or to meet forced offsets.

(c) Any owner or owners of an oil, gas or mineral lease, covering a tract or tracts of land of the same fee title of Twenty (20) acres or more, shall not drill more than one (1) well for oil or gas on each Twenty (20) acre part or unit thereof and such well shall be properly spaced, according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof, and to meet forced offsets. Each tract shall, however, not contain more than one (1) fractional unit and the division of each such tract into units may be made by the owner thereof, subject to the approval of the Commission. When the equivalent of one (1) well for every unit or fractional unit has been permitted on each such tract of land regardless of the location of the wells on

such tract, no additional wells shall be allowed on undrilled units unless and until forced by offsets.

121 PLAINTIFF'S EXHIBIT No. 4-C.

Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Oil and Natural Gas in the East Texas Field in Upshur, Gregg, Rusk, Smith and Cherokee Counties, Texas.

Austin, Texas, April 30, 1932.

Order Amending Rules and Regulations Adopted February 25, 1932.

In accordance with notice duly given in above cause, the Railroad Commission of Texas held a hearing at Austin, Texas, on April 28, 1932, and on previous dates which hearings produced testimony which formed the basis for previous orders adopting rules and regulations for the conservation of oil and gas and the prevention of waste in the East Texas Field, including the producing areas in Rusk, Gregg, Smith and Upshur Counties and the extensions thereof which now include Cherokee County; and

It Appearing from the testimony adduced at said hearings that all rules and regulations heretofore adopted by order of the Commission dated February 25, 1932, should be continued in effect, except as hereinafter provided by amendment to certain rules; and also that certain ad-

ditional rules hereinafter specified should be adopted for the prevention of waste in said field; and

It Appearing that such amendments and such newly adopted rules will serve to prevent or minimize waste in said field and promote the orderly production of crude oil and natural gas therein and tend to conserve these natural resources;

Therefore, It Is Ordered by the Railroad Commission of Texas that its order of February 25, 1932, be and the same is hereby readopted except as amended in the following particulars:

Rule 1. (a) Rule 37, adopted November 25, 1919, is hereby amended insofar as it applies to the East Texas Field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than 660 feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than 330 feet from any property or division line; provided, however, the Commission in order to prevent waste or to protect vested rights will after hearing grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing, notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing."

(b) Any owner or owners of an oil, gas or mineral lease, covering a tract or tracts of land of the same fee of twenty acres, or less, as of February 25, 1932, shall not drill more than one well for oil or gas on

said tract or tracts of land and such wells shall be property space according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof or to meet forced offsets.

(c) Any owner or owners of an oil, gas or mineral lease, covering a tract or tracts of land of the same fee title of twenty acres or more, as of February 25, 1932, shall not drill more than one well for oil or gas on each twenty acre part or unit thereof and such wells shall be properly spaced, according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof and to meet forced offsets. Each tract, however, shall not contain more than one fractional unit and the division of each such tract into units may be made by the owner thereof subject to the approval of the Commission. When the equivalent of one well for every unit or fractional unit has been permitted on each such tract of land regardless of the location of the wells on such tract no additional wells shall be allowed on undriled units unless and until forced by offsets.

124 PLAINTIFF'S EXHIBIT No. 4-D.

"Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Oil and Natural Gas in the East Texas Field in Upshur, Gregg, Rusk, Smith and Cherokee Counties, Texas.

Austin, Texas, June 30, 1932.

Order Amending Rules and Regulations Governing Said Field.

In accordance with notice duly given in the above cause, the Railroad Commission of Texas held a hearing

at Austin, Texas, on June 21st and 22nd, 1932, for the purpose of considering the amendment or continuation of presently existing rules, regulations or orders for the prevention of waste of crude oil and natural gas in said field, including the producing areas in Rusk, Gregg, Smith, Upshur and Cherokee Counties or extensions of such areas wherever located; and

It Appearing from the testimony adduced at said hearings that all rules and regulations and orders heretofore adopted by orders of the Commission dated February 25, 1932, April 30, 1932, and May 28, 1932, should be continued in effect except as hereinafter provided by amendment to certain rules; and

It Appearing that such amendments to previously adopted rules will serve to prevent or minimize waste in said field and promote the orderly production of crude oil and natural gas therein and tend to conserve these natural resources.

Therefore, It Is Ordered by the Railroad Commission of Texas that its orders of February 25, 1932, April 30, 1932, and May 28, 1932, be and the same are hereby readopted except as amended in the following particulars:

Rule 1. (a) Rule 37, adopted November 26, 1919, is hereby amended insofar as it applies to the East Texas Field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than Six Hundred and Sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than Three Hundred and Thirty (330) feet from any property or division line; provided, however, the Commission, in order to prevent waste or to protect vested rights, will, after hearing, grant exceptions permitting drilling within a less or shorter dis-

tance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing."

(b) Any owner or owners of oil, gas or mineral lease, covering a tract or tracts of land of the same fee title of Twenty (20) acres or less, as of February 25, 1932, shall not drill more than one (1) well for oil or gas on said tract or tracts of land, and such well shall be propery spaced according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof or to meet forced offsets.

(c) Any owner or owners of an oil, gas or mineral lease, covering a tract or tracts of land of the same fee title of Twenty (20) acres or more, as of February 25, 1932, shall not drill more than one (1) well for oil or gas on each Twenty (20) acre part or unit thereof and such well shall be properly spaced, according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof, and to meet forced offsets. Each tract shall, however, not contain more than one (1) fractional unit and the division of each such tract into units may be made by the owner thereof, subject to the approval of the Commission.

(d) Any operator having a lease or tract of land with 20 acre undrilled units thereon or an undrilled fractional unit, meeting the requirements of the foregoing provisions of Rule 1 herein, may drill not to exceed one well on each undrilled 20 acre unit or fractional unit, spaced not less than 330 feet to any offset lease line

and not less than 660 feet to any other drilling or producing well on the same or adjoining tract, and any such well will be accepted by the Railroad Commission as a regular location, not requiring a special permit, provided that each time an operator desires to drill a well under this provision, such operator will submit a plat showing the division of the tract of land into units and, in addition to the proposed location, the location of all wells surrounding the 20 acre unit on which the well is to be drilled.

127 PLAINTIFF'S EXHIBIT No. 4-E.

"Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field.

Austin, Texas, January 31, 1933.

Supplemental Order Amending Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field Composed of Upshur, Smith, Rusk, Gregg and Cherokee Counties, Texas.

Whereas, the Railroad Commission of Texas, on February 25, 1932, adopted an order promulgating rules and regulations for the prevention of physical waste of crude

petroleum oil and natural gas in what is known as the East Texas field composed of Upshur, Smith, Rusk, Gregg and Cherokee Counties, Texas, and among other rules adopted for that purpose was the amendment of Rule 37 limiting the spacing of wells in said field, which amendment has been continuously kept in effect by subsequent orders; and

Whereas, it appears to said Commission that from evidence adduced at the East Texas hearing held in Austin, December 28 to 31, 1932, inclusive, said rule should be further amended, in order that properties might be more carefully developed so as to insure a maximum oil recovery;

Therefore, It Is Hereby Ordered by the Railroad Commission of Texas that, effective as of the date hereof, Rule 1, Section (a) of said order of February 25, 1932, relating to the modification of Rule 37 be and the same is hereby amended so as to hereafter read as follows:

Rule 1. (a) Rule 37, adopted November 26, 1919, is hereby amended insofar as it applies to the East Texas field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than six hundred and sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than three hundred and thirty (330) feet from any property or division line; provided, however, the Commission in order to prevent waste or to protect vested rights, will, after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing, notice of hear-

ing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing; and, provided further that in cases of forced offsets the Commission may grant exceptions without waivers or hearing when it is evident that the wells desired are necessary to protect the properties on which it is proposed to drill them."

Section (b) and (c) of said order of February 25, 1932, and any or all other orders relating to spacing of wells on twenty (20) acre units and fractional units in said East Texas Field are hereby canceled.

129 PLAINTIFF'S EXHIBIT No. 4-F.

"Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field.

Austin, Texas, June 13, 1933.

Supplemental Order Amending Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field Composed of Upshur, Smith, Rusk, Gregg and Cherokee Counties, Texas.

It appearing to the Commission from evidence adduced at the East Texas hearing held in Austin on June 12,

1933, that Rule 37, limiting the spacing of wells in the East Texas field, including Upshur, Smith, Rusk, Gregg and Cherokee Counties, should be amended in order that properties might be more fully developed so as to insure a maximum oil recovery and to allow owners of various properties in said fields to protect themselves against inequities which might result from a strict enforcement of said Rule 37;

Therefore, It Is Hereby Ordered by the Railroad Commission of Texas that, effective as of the date hereof, Rule 1, Section (a) of the order of January 31, 1933, of the Railroad Commission, modifying and readopting Rule 37 be and the same is hereby amended so as to hereafter read as follows:

Rule 1. (a) Rule 37, adopted November 26, 1919, is hereby amended insofar as it applies to the East Texas Field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than six hundred and sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than three hundred and thirty (330) feet from any property or division line; provided, however, the Commission in order to prevent waste, or to protect vested rights, or to protect any property against undue drainage by reason of the operation of the wells of any other operator, will after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove described, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing, notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing; and, provided, further, that

in cases of forced offsets the Commission may grant exceptions without waivers of hearing when it is evident that the wells desired are necessary to protect the properties on which it is proposed to drill them."

131 PLAINTIFF'S EXHIBIT No. 4-G.

"Railroad Commission of Texas.
Oil and Gas Division.

Oil and Gas Docket Nos. 108, 120, 123, 124, 125, 126, 128, 129 and 132.

In Re: Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the State of Texas and Particularly in the Fields and Counties Hereinafter Mentioned.

Austin, Texas, Oct. 17, 1933.

Supplemental Order Amending Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field Composed of Upshur, Smith, Rusk, Gregg and Cherokee Counties, Texas.

Division II. Drilling.

Rule 1. (a) Rule 37, adopted November 26, 1919, is hereby amended insofar as it applies to the East Texas field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than six hundred and sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for

oil or gas at any point less than three hundred and thirty (330) feet from any property or division line; provided, however, the Commission in order to prevent waste, or to protect vested rights, or to protect any property against undue drainage by reason of the operation of the wells of any other operator, will after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing, notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing; and, provided, further, that in cases of forced offsets the Commission may grant exceptions without waivers of hearing when it is evident that the wells desired are necessary to protect the properties on which it is proposed to drill them."

132 PLAINTIFF'S EXHIBIT No. 4-H.

(Excerpt from Oil and Gas Conservation Rules and Regulations. Oil and Gas Circular No. 16-B, issued by Railroad Commission on May 15, 1934, being under II—Drilling, as found on pages 57 and 58, of said circular.)

II. Drilling: Rule 1. Rule 37, adopted November 26, 1919, is hereby amended in so far as it applies to the East Texas Field so as to hereafter read as follows: No well for oil or gas shall hereafter be drilled in said East Texas Field nearer than 660 feet to any other completed or drilling well on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line, or subdivision line; provided that the Commission in order to

prevent waste or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equalling four hundred feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule, and accurately showing to scale all other completed drilling and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten days' notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard and after the Commission has determined that an exception to such rule is necessary to either prevent waste or to protect the property belonging to applicant from confiscation. All pending applications shall be amended to conform to the rule before being acted upon.

No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule, and no well drilled under such a special permit which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas; and any such well so drilled in violation of said rule

or in violation of permit granted as a special exception to said rule shall be plugged.

The order entered by this Commission on August 30, 1933, commonly designated as the direct and equidistant offset order is hereby rescinded, annulled and shall be of no further force and effect. All other rules, regulations and orders of this Commission which conflict with the terms and provisions of Rule No. 1 as hereby amended and promulgated is hereby declared to have no further application to wells in said East Texas Field to the extent of such conflict.

In the adoption and promulgation of this order it is here declared that the Commission intends to adopt each phrase, sentence, and paragraph separately and independently of each other such phrase, sentence and paragraph, and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion.

(Adopted May 29, 1934.)

Mr. Rauhut:

I next desire to offer, unless it can be stipulated, the chain of assignments of oil and gas leases from Mamie Hammonds on the strip involved in this case, down into G. E. Burford, and also into the X Y Z Oil and Gas Company. Do you care to stipulate these?

Mr. Kuykendall:

We would like to see what they are, first.

The Court:

Why don't you agree, after you look at them, that they are all right—that you will stipulate it?

Mr. Cale:
Yes; we have no desire to—

The Court:
You can do that during the recess period.

Mr. Cale:
Yes, sir, if they will just agree that Burford owns the title to this tract it might eliminate some of these things, as far as the Railroad Commission is concerned.

Mr. Kuykendall:
X Y Z Oil and Gas Company succeeded to all the rights Burford had.

Mr. Rauhut:
The date on these have some importance, and we can make a short stipulation, if they are willing to stipulate.

The Court:
All right; you can do that during the recess period.

Mr. Rauhut:
I next desire to offer in evidence the application of G. E. Burford for permit to drill wells 1, 2, 3 and 4 on this tract or strip designated as W. L. Fuller 2.33 acres, consisting of what is called a Form 1 and a plat filed in the Oil & Gas Division of the Railroad Commission June 18, 1938. This is a certified copy.

(Thereupon the Application and plat referred to above were marked for identification as Plaintiff's Exhibits No. 5 and No. 5-A, respectively,--same being here set out as follows):

136 PLAINTIFF'S EXHIBIT No. 5.

Please Refer to File No. .....

Form 1.

Railroad Commission of Texas—Oil and Gas Division, Austin, Texas.

Important Notice: This is the first record the Railroad Commission has of any well. It is made the basis of all subsequent correspondence. Hence It Must Be Correct.

Notice of Intention to Drill or Deepen.

(Use Form 2-A for Notice of Intention to Plug).

(To comply with Rules of the Railroad Commission of Texas governing Oil and Gas Conservation in Texas.)

Read Carefully and Comply Fully.

In order that it may be ascertained whether or not the proposed location covered by this notice conforms to the applicable spacing regulations set down by the Railroad Commission, there are two important footages that must be shown; that is, The Nearest Distance Of Proposed Location From Lease Or Property Line And Distance Of Proposed Location From The Nearest Well On The Same Lease. Do not begin operation on any location before filing Form 1, and do not begin operations on any location not conforming to the spacing rules for such location until you receive written order from the commission granting permission.

For the purpose of this determination draw on the back side hereof a neat, accurate sketch, made to scale, of

this lease, block, or lot locating thereon the proposed site for this location with reference to the two nearest lease lines. Also show the nearest wells on all sides of this location and the distances from the proposed location to those wells. Give names and addresses of adjoining lease or property owners, and designate all property by lease and company name. You may attach a blue print showing this information if you so desire.

Do Not Confuse Survey Lines With Lease Lines. If The Sketch Or Blue Print Shows Only A Section, Block, Or Lot Out Of Your Lease, Designate Same As Being Only That Part Of The Lease.

Where the size of the tract will permit, use scale of one inch equaling 400 feet; if less than 2 acres use scale of one inch equaling 100 feet. Designate Scale To Which Plat Or Sketch Is Drawn. Also Designate Northerly Direction On The Sketch Or Plat.

Fill In Below In The Spaces Reserved For This Purpose The Footages Asked For:

Nearest distance from proposed location to property or lease line 23 feet.

Distance from proposed location to nearest drilling, completed, or applied for well on same lease feet.

Draw Sketch Above Referred To On Reverse Side Hereof Or Attach To This Notice A Blue Print Showing This Information.

(On Margin) 2 P. M. Aug. 15.

This notice must be delivered to Deputy Supervisor of your district before drilling, or deepening. He will forward to the Railroad Commission, Austin, Texas.

Date June 17, 1938.

Name of company or operator:
Name G. E. Burford.
Address 1303 Tower Petroleum Bldg.
City Dallas, Texas.
(Notify Harry S. Pollards, 615 Norwood Bldg., Austin.)

Description of farm or lease:
Name (Fee owner) W. L. Fuller.
Number of Acres 2.33. Wells No. 1, 2, 3, & 4.
Survey Sanches.
Section No. ..... Block No. .....
Located in East Texas, Field, Gregg County, Five Miles East direction from Gladewater nearest postoffice or town.

Rotary or Cable Tools: Rotary.
Date work will start drilling: At Once.
Depth to which you propose to drill: 3700 feet.
Date work will start deepening:
If Lease Purchased with one or more wells drilled from Whom Purchased?

Name .....
Address .....

(Stamped) Received Austin Jun 18 1938 Oil & Gas Division.

Deliver to Deputy Supervisor in Charge of District in Which Well Is Located.

Rule 37. Spacing Rule—(Applies to all fields in the State except where special field rules govern)—No well for oil or gas shall hereafter be drilled nearer than 300 feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than 150 feet to any property line, lease line, or sub-division line; provided that the Commission

in order to prevent waste or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distance than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired, application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equaling 400 feet, accurately showing to scale the property on which permit is sought, to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten days notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect the property belonging to applicant from confiscation. All pending applications shall be amended to conform to this rule before being acted upon. Upon similar application and showing the Commission may grant exceptions to the application of this rule in fields where the production is obtained from a formation which is known to be segmented by piercement of intrusive salt plugs.

"In the interest of protecting life and property and for other just and reasonable causes the Commission reserves the right in particular fields to enter special orders increasing the minimum distances provided by this rule.

"No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule and no well drilled under such a special permit, which does not conform to the terms of such special permit in all respects shall be permitted to produce either oil or gas and any such well so drilled in violation of said rule or in violation of a permit granted under an exception to such rule shall be plugged."

Notice: Before Sending In This Form Be Sure That You Have Given All Information Requested. Much Unnecessary Correspondence Will Thus Be Avoided.

(Written) denied 25562—C. C. Cammack—3/17/38.

(Mr. H. Pollard has file.)

State of Texas,
County of Travis.

I, C. F. Petet, Secretary of the Railroad Commission of the State of Texas, do hereby certify that the attached instrument, described as follows:

Photostatic copy of Notice of Intention to Drill

(Form 1) filed by G. E. Burford to drill wells Nos. 1, 2, 3 and 4 W. L. Fuller 2.33 acre tract in the Sanchez Survey, in Gregg County, Texas, Dated June 17, 1938, with plat covering same attached.

is a true and correct copy of the original instrument now on file in the Railroad Commission, and in my custody as Secretary and Custodian of the files of the Railroad Commission.

Witness my hand and seal of the Railroad Commission of Texas, this the 17th. day of February, 1940.

(Signed) C. F. PETET,
(C. F. Petet)
Secretary.

PLAINTIFF'S EXHIBIT NO. 5-A.

I, PATRICK TYRE, an Engineer employed by HUDNALL & PIRTLE, Tyler, Texas do hereby certify that this plat truly and correctly shows the locations of the wells as found in a survey by me on the ground on Jan. 26 A. D. 1938. Patrick Tyre

Subscribed and Sworn before me, a Notary Public, on this 9 day of June A. D. 1938.

Notary Public in and for Smith County Texas

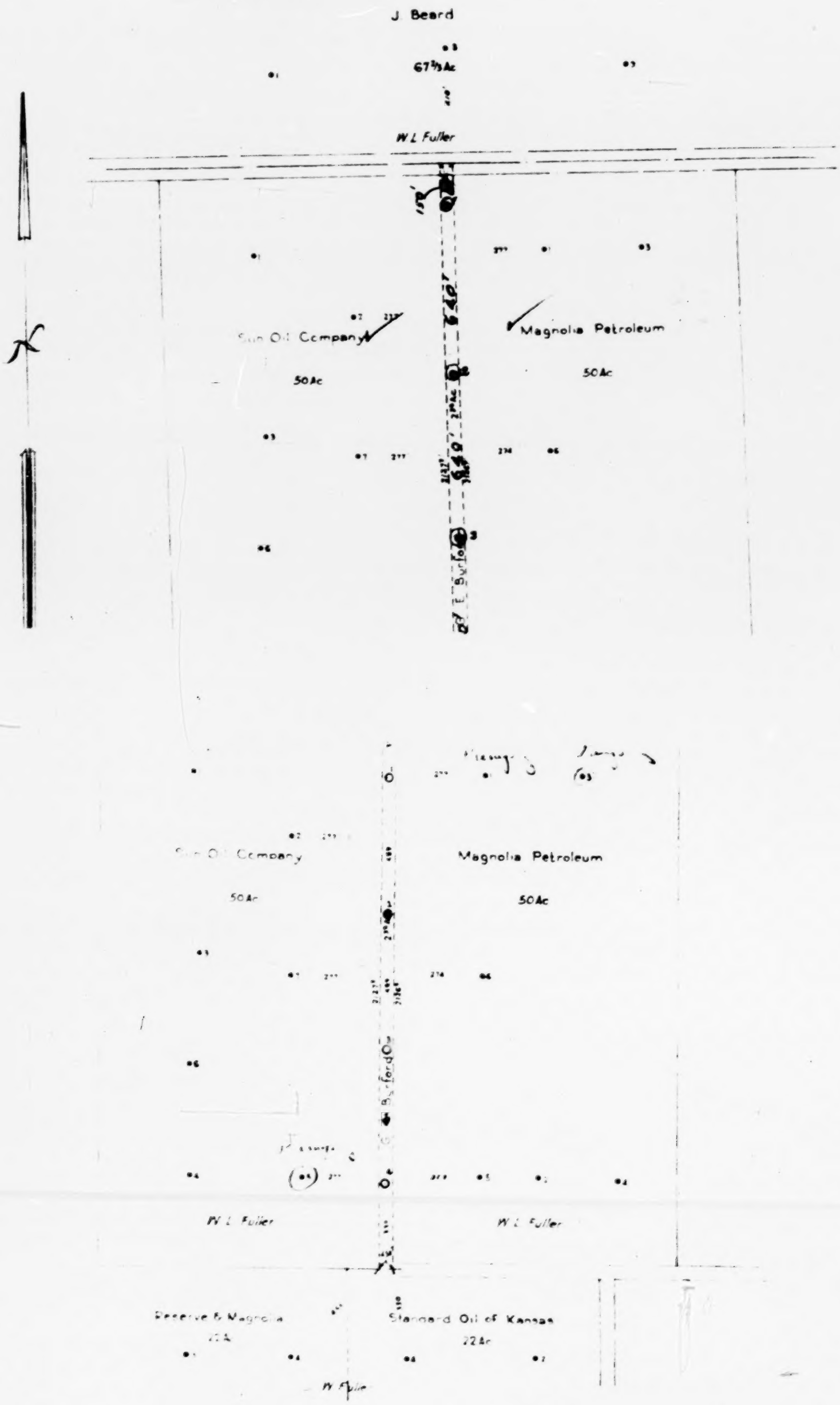
PLANE TABLE PLAT

G. E. Burford – W. L. Fuller

D. SANCHES SUR GREGG CO. TEXAS

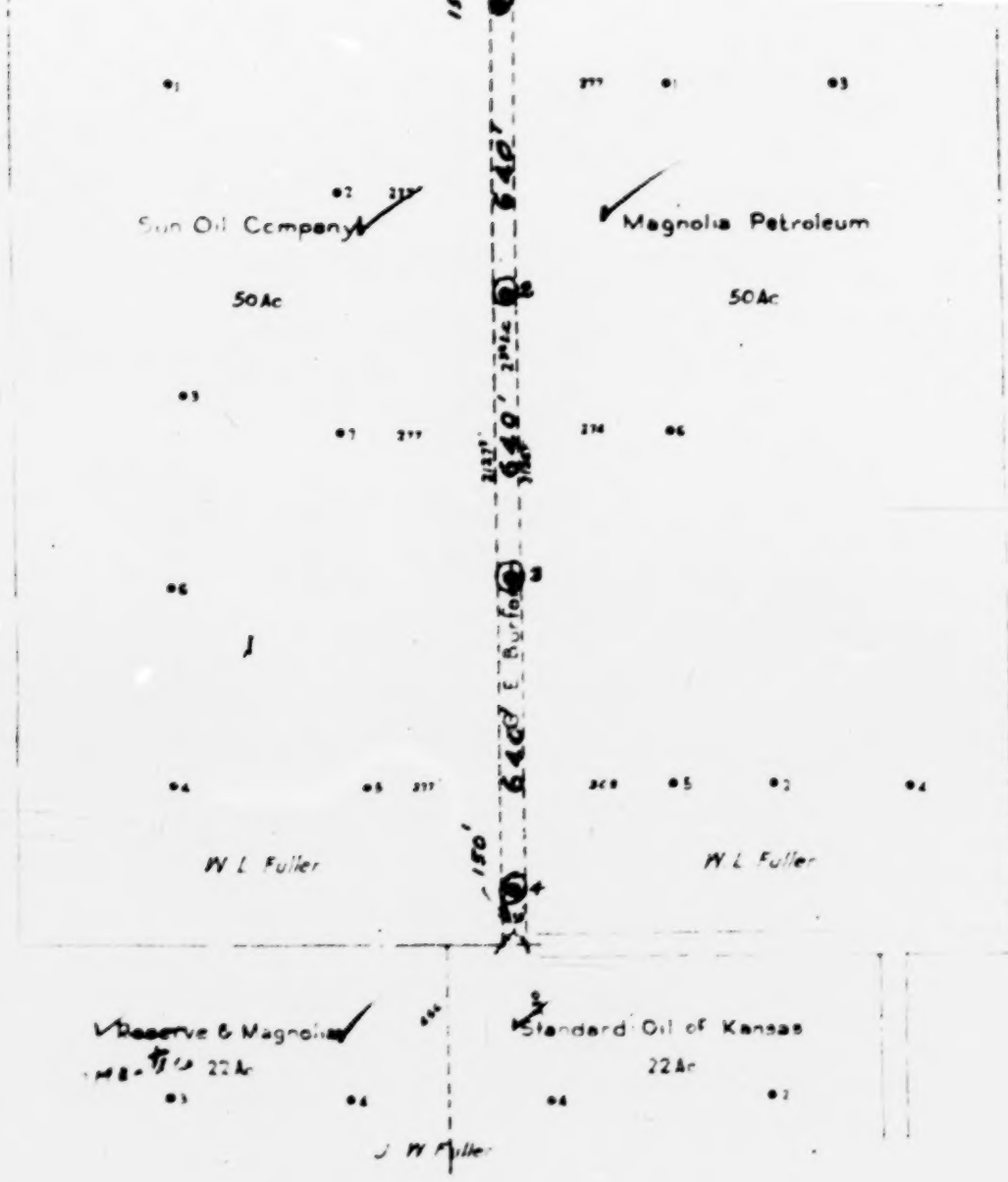
SCALE: 1"-400 JAN. 26, 1938

Hudnall & Pirtle



I, Patrick Tyre, a licensed land surveyor do hereby certify that this plat is the result of a survey made by me on the ground and that it is correct to the best of my knowledge and belief. Distances are scaled from original field sheet and loose dimensions are from the survey.

Patrick Tyre
LICENSED LAND SURVEYOR



I, A P Lyle, a licensed land surveyor do hereby certify that this plat is the result of a survey made by me on the ground, and that it is correct with the practical limits of the method employed. Distances are scaled from original field sheet and lease dimensions from chain survey.

A P Lyle
LICENSED LAND SURVEYOR

Plaintiff's Ex. No. 5-A

Mr. Rauhut:

I next offer in evidence the notice of hearing issued by the Railroad Commission on that application,—calling a hearing for August 15, 1938, and call attention to the fact that this notice was issued only to those owners that are shown on that map, and the attorneys in the case, I believe, were also included.

(Thereupon the Notice of Hearing referred to above was marked for identification as Plaintiff's Exhibit No. 6,—same being here set out as follows):

143 PLAINTIFF'S EXHIBIT No. 6.

August 1, 1938.

G. E. Burford, c/o C. C. Cammack, 1303 Tower Petroleum Bldg., Dallas, Texas; Harry Pollard, G. Griffin, Dillard Estey, Standard Oil Co. of Kansas, Box #256, Houston, Texas, protests.

Magnolia Petroleum Co., Dallas, Texas; J. B. Robertson, J. G. Beard, Duncan, Okla.; S. W. Ketchen.

Sun Oil Co., Dallas, Texas; C. B. Jeffrey, D. M. Collingwood, C. B. Jeffrey, Littlefield Bldg., Austin, Texas.

The Atlantic Refining Co., c/o H. C. Renz, Box #2819, Dallas, Texas; J. W. Stayton, Harry Pollard, 615 Norwood Bldg., Austin, Texas.

Gentlemen:

Please accept this as a notice of hearing covering the application of G. E. Burford for a special permit to drill wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33

acre tract in the Sanchez Survey in Gregg County, Texas.

Location desired is as follows:

No. 1: 150′ S. of the N. Line Midway from E. and W. Line.

No. 2: 640′ S. of No. 1 location Midway from E. and W. line.

No. 3: 640′ S of No. 2 location Midway from E. and W line.

No. 4: 150′ N. of S. line. 640′ S. of N. 3 location. Midway from E. and W. line.

Hearing will be held in the offices of the Railroad Commission in Austin, Texas, at 2:00 p. m., August 15, 1938.

Yours very truly,

zk.,

(Notation).

Denied Case 4942 to S. M. Dunbar 11/23/31.

Denied Case 10032 to J. L. Meek 8/4/33 (½ of strip).

Denied Case 10033 to Lester White 8/4/33 (½ of strip).

Denied Case 10856 to Mamie Hammond 11/7/33.

Denied Case 25562 to C. C. Cammack 3/12/38.

State of Texas,
County of Travis.

I, C. F. Petet, Secretary of the Railroad Commission of the State of Texas, do hereby certify that the attached instrument, described as follows:

Photostatic copy of carbon copy of Notice of Hearing covering application of G. E. Burford for a special permit to drill wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33 acre tract in the Sanchez Survey in Gregg County, Texas.

Said hearing to be held on August 15, 1938.

is a true and correct copy of the original instrument now on file in the Railroad Commission, and in my custody as Secretary and Custodian of the files of the Railroad Commission.

Witness my hand and seal of the Railroad Commission of Texas, this the 17th. day of February, 1940.

(Signed) C. F. PETET,
(C. F. Petet)
Secretary.

Mr. Rauhut:

We next offer in evidence the application of G. E. Burford for permit to drill wells 1, 2, 3, and 4 on W. L. Fuller 2.33 acres, consisting of what is called a Form 1 and a plat,—filed in the Oil & Gas Division of the Railroad Commission on January 9, 1939.

(Thereupon the Application and Plat referred to above were marked for identification as Plaintiff's Exhibits No. 7 and No. 7-A, respectively,—same being here set out as follows):

145 PLAINTIFF'S EXHIBIT No. 7.

Please Refer to File No. .....

Form 1.

Railroad Commission of Texas, Oil and Gas Division, Austin, Texas.

Important Notice: This is the first record the Railroad Commission has of any well. It is made the basis of all subsequent correspondence. Hence It Must Be Correct.

Notice of Intention to Drill or Deepen.

(Use Form 2-A for Notice of Intention to Plug).

(To comply with Rules of the Railroad Commission of Texas governing Oil and Gas Conservation in Texas.)

Read Carefully and Comply Fully.

In order that it may be ascertained whether or not the proposed location covered by this notice conforms to the applicable spacing regulations set down by the Railroad Commission, there are two important footages that must be shown; that is, The Nearest Distance Of Proposed Location From Lease Or Property Line And Distance Of Proposed Location From The Nearest Well On The Same Lease. Do not begin operation on any location before filing Form 1, and do not begin operations on any location not conforming to the spacing rules for such location until you receive written order from the Commission granting permission.

For the purpose of this determination draw on the back side hereof a neat, accurate sketch, made to scale, of this

lease, block, or lot locating thereon the proposed site for this location with reference to the two nearest lease lines. Also show the nearest wells on all sides of this location and the distances from the proposed location to those wells. Give names and addresses of adjoining lease or property owners, and designate all property by lease and company name. You may attach a blue print showing this information if you so desire.

Do Not Confuse Survey Lines With Lease Lines. If The Sketch Or Blue Print Shows Only A Section, Block Or Lot Out Of Your Lease, Designate Same As Being Only That Part Of The Lease.

Where the size of the tract will permit, use scale of one inch equaling 400 feet; if less than 2 acres use scale of one inch equaling 100 feet. Designate Scale To Which Plat Or Sketch Is Drawn. Also Designate Northerly Direction On The Sketch Or Plat.

Fill In Below In The Spaces Reserved For This Purpose The Footages Asked For:

Nearest distance from proposed location to property or lease line 24 feet.

Distance from proposed location to nearest drilling, completed, or applied for well on same lease ..... feet. (See Plat attached.)

Draw Sketch Above Referred To On Reverse Side Hereof Or Attach To This Notice A Blue Print Showing This Information.

This notice must be delivered to Deputy Supervisor of your district before drilling, or deepening. He will forward to the Railroad Commission, Austin, Texas.

Date January 9, 1939.

Name of company or operator:
Name: G. E. Burford.
Address: 4436 Fairfax Avenue.
City: Dallas, Texas.

Description of farm or lease:
Name (Fee owner): W. L. Fuller.
Number of Acres: 2.33 Wells No. 1, 2, 3 & 4.
Survey: D. Sanches.
Section No. ..... Block No. .....
Located in East Texas Field, Gregg County, Three Miles N. E. direction from Longview, nearest postoffice or town.

Rotary or Cable Tools: Rotary.
Date work will start drilling: At Once.
Depth to which you propose to drill: 4000 feet.
Date work will start deepening .....
If Lease Purchased with one or more wells drilled from whom purchased?

Name .....
Address .....

(Stamped) Received Austin Jan 9 1939 Oil & Gas Division.

Deliver to Deputy Supervisor in Charge of District In Which Well Is Located.

Rule 37. Spacing Rule—(Applies to all fields in the State except where special field rules govern)—No well

for oil or gas shall hereafter be drilled nearer than 300 feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than 150 feet to any property line, lease line, or subdivision line; provided that the Commission in order to prevent waste or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distance than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired, application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equaling 400 feet, accurately showing to scale the property on which permit is sought, to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten days notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect property belonging to applicant from confiscation. All pending applications shall be amended to conform to this rule before being acted upon. Upon similar application and showing the Commission may grant exceptions to the application of this rule in fields where the production is obtained from a formation which is known to be segmented by piercement of intrusive salt plugs.

"In the interest of protecting life and property and for other and just reasonable causes the Commission reserves the right in particular fields to enter special orders increasing the minimum distances provided by this rule.

"No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule and no well drilled under such a special permit, which does not conform to the terms of such special permit in all respects shall be permitted to produce oil or gas and any such well so drilled in violation of said rule or in violation of a permit granted under an exception to such rule shall be plugged."

Notice: ' Before Sending In This Form Be Sure That You Have Given All Information Requested. Much Unnecessary Correspondence Will Thus Be Avoided.

State of Texas,
County of Travis.

I, C. F. Petet, Secretary of the Railroad Commission of the State of Texas, do hereby certify that the attached instrument, described as follows:

Photostatic copy of Notice of Intention to Drill

(Form 1) filed by G. E. Burford to drill wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33 acre tract in the Sanchez Survey in Gregg County, Texas; dated January 9, 1939, with plat covering same attached.

is a true and correct copy of the original instrument now on file in the Railroad Commission, and now in my custody as Secretary and Custodian of the files of the Railroad Commission.

Witness my hand and seal of the Railroad Commission of Texas, this the 17th day of February, 1940.

(Signed) C. F. PETET,
(C. F. Petet)
Secretary.

PLAINTIFF'S EXHIBIT NO. 7-A.

I, PATRICK TYRE, an Engineer employed by HUDNALL & PIRTLE, Tyler, Texas, do hereby certify that this plat truly and correctly shows the locations of the wells as found in a survey by me on the ground on Jan. 26 A. D. 1938. Patrick Tyre

Subscribed and Sworn before me, a Notary Public, on this 17 day of Dec. A. D 1938

Notary Public in and for Smith County Texas

PLANE TABLE PLAT

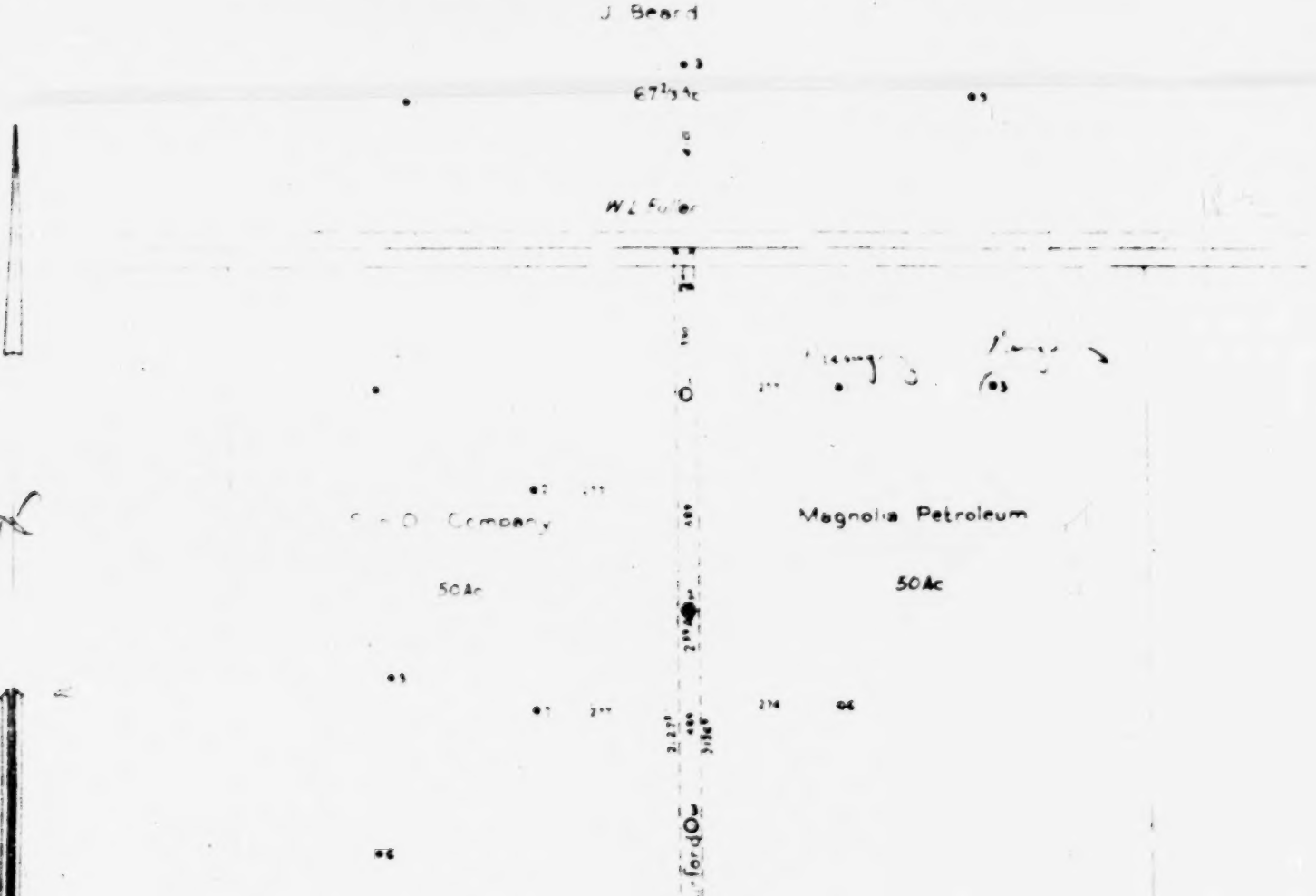
G. E. Burford – W. L. Fuller

D SANCHES SUR GREGG CO TEXAS

SCALE 1"=400 JAN. 26, 1938

Hudnall & Pirtle

Revised from Permit Records 12-26-38



Mr. Rauhut:

We next offer in evidence a copy of the Notice of Hearing on that Application, calling a hearing for January 31, 1939, showing the parties that were notified of the hearing; and we want to call attention to the fact that the owners to the west and northwest—that is, the owners of the lease to the northwest of the Sun Oil Company tract as shown on Exhibit 1 were not notified of this hearing, they were notifying only those owners who had tracts adjoining the 2.33 acres.

(Thereupon the Notice of Hearing referred to above was marked for identification as Plaintiff's Exhibit No. 8,—same being here set out as follows):

152 PLAINTIFF'S EXHIBIT No. 8.

(In Red Pencil) 1-31 at 9:30.

Railroad Commission of Texas,
Oil and Gas Division.
Austin, Texas.

Jan. 18, 1939.

G. E. Burford, 4436 Fairfax Ave., Dallas, Texas.

Magnolia Petroleum Co., Dallas, Texas.

Sun Oil Co., Dallas, Texas.

The Atlantic Refining Co., c/0 H. C. Renz, Box 2819, Dallas, Texas.

Standard Oil Co. of Kansas, Box 256, Dallas, Texas.

J. G. Beard, Duncan, Okla.

C. B. Jeffrey, Littlefield Bldg., Austin, Texas.

H. L. Williford, Railroad Commission, Kilgore, Texas.

Gentlemen:

Please accept this as notice of hearing to be held covering the application of G. E. Burford for special permit to drill wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33 acre tract in the D. Sanches Survey, Gregg County.

The locations desired are:

No. 1—330 feet south of the north line; midway between east and west lines.

No. 2—489 feet south of location No. 1; midway between east and west lines.

No. 3—489 feet south of location No. 2; midway between east and west lines.

No. 4—330 feet north of the south line; midway between the east and west lines.

Four wells on this tract at slightly different locations were denied by the Commission on September 21, 1938, in Rule 37, Case No. 26,868. On January 10, 1939, the Railroad Commission granted the applicant's motion for rehearing.

Rehearing will be held in the offices of the Oil & Gas Division in Austin, Texas, at 9:30 A. M., January 31, 1939.

Yours very truly,
STANFORD PAYNE,
(Stanford Payne)
Chief Deputy Supervisor,
Oil & Gas Division.

Mr. Rauhut:

Gentlemen, may it be agreed that following the hearing on the notice last offered, the Railroad Commission entered an order, a copy of which is atıached as Exhibit "A" to the Bill of Complaint, the order being dated March 25, 1939, granting location No. 2, and denying locations Nos. 1, 3 and 4?

Mr. Hart:

Mr. Rauhut, we have not compared that copy of yours. I presume it is accurate. We have no objection to saving time on that.

Mr. Rauhut:

If there is any mistake in it, we want it corrected, and will be glad to have it done. Will you call attention to it, after you have checked it, in the event you find any error?

Mr. Hart:

Yes, sir, I will.

Mr. Rauhut:

Is that agreeable to you, Mr. Kuykendall, also?

Mr. Kuykendall:

Yes, sir.

(Thereupon the Order referred to above was received in evidence, same being here set out as follows):

154 EXHIBIT "A"—Order of the Railroad Commission of Texas, dated 3/25/39, omitted from the printed record, being heretofore copied at page 30.

* * * * * * * * *

Mr. Rauhut:

It is admitted by the pleadings that following the entry of that order on March 25, 1939, that the defendant Burford applied for a rehearing, within the time required by the Commission's rules, on his locations 1, 3 and 4, and that Sun Oil Company applied to the Commission for a rehearing on location No. 2. I merely call attention to the agreement—I mean to the pleadings on that point, as stated in the pleadings, without offering proof on that.

The Court:

As I understand it, the Commission reheard the matter and granted all four of them.

Mr. Rauhut:

Yes, sir.

The Court:

All right. Any dispute about that?

Mr. Cale:

None from us, Your Honor,—no dispute from us on that.

The Court:

All right.

Mr. Rauhut:

It is entered an order granting a rehearing on April 29, 1939, on both motions for a rehearing.

The Court:

All right.

Mr. Rauhut:

We next offer in evidence the Order which is complained of, granting a permit to drill four locations on

this tract, dated June 2, 1939,—a copy of which is attached to the Complaint as Exhibit "B". May that be considered in evidence—that Exhibit "B", which is a true copy of the original order, or if you wish—

Mr. Cale:
That is agreeable with us, Your Honor, if it is a correct copy. We have not checked it recently.

The Court:
All right.

Mr. Kuykendall:
The other defendants will agree to that.

The Court:
All right; let the record so show.

(Thereupon the Order referred to above was received in evidence, same being here set out as follows):

157 EXHIBIT "B"—Order of Railroad Commission of Texas, dated 6/2/39, omitted from the printed record, being heretofore copied at page 31.

* * * * * * * * *

Mr. Rauhut:
If Your Honor please, as bearing upon the reasonableness of the Order of the Railroad Commission we desire to offer in evidence the Motion for Rehearing which Sun Oil Company filed with the Railroad Commission on June 22, 1939, in which and in addition to stating other grounds of objections which are presented in the petition, the Sun Oil Company offered to pool this lease with this 2.33 acres in order that Mr. Burford could get his share

of the oil without any necessity for drilling any wells on this strip.

The Court:
What do you say, gentlemen?

Mr. Cale:
Your Honor, we have no objection to the introduction of the original, or he may substitute a true copy.

The Court:
All right; it will be admitted in evidence.

(Thereupon the Motion for Rehearing referred to above was marked for identification as Plaintiff's Exhibit No. 9,—same being here set out as follows):

159 PLAINTIFF'S EXHIBIT No. 9.

In Re: Application of G. E. Burford for Permit to Drill Wells Nos. 1, 2, 3 and 4 W. L. Fuller 2.33 Acre Tract, Sanches Survey, Gregg County, Texas. (Rule 37, Case No. 26,898).

To the Railroad Commission of Texas:
Sun Oil Company and Magnolia Petroleum Company hereby petition the Railroad Commission of Texas for the following relief:

I.

That the Railroad Commission's order of March 23, 1939, granting permit to drill well No. 2 and its order of June 2, 1939, granting permit to drill wells Nos. 1, 2, 3 and 4 on the lease described in the caption and at locations indicated in such orders, be set aside after further hearing,

and that an order be entered denying the above described application in all respects for the following reasons:

1. This Honorable Commission was without jurisdiction to enter said orders because there was then and is now pending in the 53rd District Court of Travis County Cause No. 53,915, styled Sun Oil Company vs. Railroad Commission of Texas et al, appealing from order of the Railroad Commission granting applicant's predecessors in title a permit to drill a well on this said strip.

2. In Cause No. 54,769 with which was consolidated Cause No. 54,743 wherein Magnolia Petroleum Company and Sun Oil Company were Plaintiffs and the Railroad Commission and applicant's predecesosrs in title were Defendants the 53rd District Court of Travis County entered a final judgment cancelling a permit heretofore granted by the Commission for a well location on this strip, and perpetually enjoining the drilling or operation of said location for oil or gas on this strip, said permit having been granted to applicant's predecessors in title on October 11, 1934, in Rule 37 Case No. 10,956; and said judgment is res adjudicata of issues involved in this application.

3. The undisputed evidence before the Commission shows the strip, if it exists, is a subdivision from the leasehold estate in the West 50 acres of the W. L. Fuller farm and is capable of development as a whole with it, and there is no testimony that the West 50 acres and the strip, considered as an entirety for development purposes, are not reasonably protected from drainage or need either or all of the four locations in controversy in order to prevent drainage to adjacent tracts or to prevent confiscation of property within the meaning of the spacing rule

applicable to said area, and petitioners assert none of said additional wells are needed for such purpose.

4. Petitioners here now offer to pool their leases on the W. L. Fuller tract with the leasehold estate in the strip, in either of the following ways: (a) the entire strip and Sun Oil Company's adjoining lease, so they may be developed as one entire tract; (b) the entire strip and Magnolia Petroleum Company's adjoining Fuller lease, so they may be developed as one entire tract; (c) pool half of the strip with Sun Oil Company's adjoining lease and half of the strip with Magnolia Petroleum Company's adjoining Fuller lease. Under either of the above offers, the owner of the leasehold estate in the strip and the owner of the leasehold estate in the property pooled with it would share ratably in future production from the pooled property in proportion to the acreage so contributed by each owner, less deduction in the same proportion for future drilling and operating expenses.

5. The drilling and operation of said four locations on the land covered by the application, considered as a separate tract, are not necessary to give the owner thereof an opportunity to produce the equivalent of the recoverable oil in place under it. One well will give the strip a great advantage over petitioners' adjoining leases. The granting of permit for four locations permits applicant to drain and confiscate petitioners' property without compensation, and denies them due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

6. Each and all of said four locations are unnecessary to prevent waste of oil and gas, as the existing wells are sufficient to recover the recoverable oil in place. The drilling and operation of each or either of said locations will force offsets in close proximity and at closer distances

than are provided in the spacing rule, causing uneven spacing and withdrawals, which will cause waste of oil and gas.

7. The transcript of evidence offered at the hearing held May 19, 1939, before the Commission's examiner was not transcribed until after this Commission entered its order on June 2, 1939, and therefore was not read by the Commission, which had only the report of the hearing contained in the examiner's memorandum of June 1, 1939. Said memorandum is insufficient in that it fails to state with particularity the evidence adduced at the hearing held May 19, 1939, and erroneously states that protestants' witness testified the drilling of these four locations will bring about a more uniform spacing of wells on the entire Fuller 100 acres. Said memorandum fails to state that said expert testified the Fuller tract is not being drained by wells on other lands, and erroneously states the reason why Sun Oil Company refused to submit its witness for cross-examination by applicant, the true reason being that applicant's witness refused to permit Sun Oil Company's attorneys to further cross-examine him, and the examiner refused to compel same, and Sun Oil Company offer to submit its witness to cross-examination by applicant when applicant's witness submitted to further cross-examination. By reason thereof petitioners have not had a full and proper hearing by this Railroad Commission.

II.

In the alternative, if the Commission holds there is any reasonable basis for permitting the drilling of each or either of said four locations on the strip as a separate tract, petitioners hereby request that the allowable production of such locations as this Commission decides to permit on said strip be adjusted, and that the permit for drilling and operating same be expressly so conditioned,

that the total allowable production from said 2.33 acre strip on each producing day shall not exceed 2.33/100ths of the total allowable production for the remaining and adjoining 100 acres of the W. L. Fuller tract as fixed by the Railroad Commission for each said day; and petitioners show that such provision and condition will enable G. E. Burford to produce, and only produce, his fair share of the oil in place.

A copy of this motion has been mailed to G. E. Burford.

Wherefore Petitioners each pray that the relief herein requested be granted.

SUN OIL COMPANY,

By .....,

MAGNOLIA PETROLEUM COMPANY,

By .....

Mr. Rauhut:

We next offer in evidence the Order of the Railroad Commission of July 10, 1939, denying the petition for rehearaing and alternative relief filed by Sun Oil Company and Magnolia Petroleum Company on June 22, 1939.

(Thereupon the Order referred to above was marked for identification as Plaintiff's Exhibit No. 10,—same being here set out as follows:)

164 PLAINTIFF'S EXHIBIT No. 10.

Motion for Rehearing by Sun Oil Company and Magnolia Petroleum Company.

Case No. 26,868—Rule 37.

Applicant:
G. E. Burford, 4436 Fairfax Avenue, Dallas, Texas.

Motion for rehearing in the above styled case having been this date considered by the Railroad Commission of Texas, and it appearing that the reasons set out in said motion are insufficient to justify the granting of a rehearing covering the application of G. E. Burford for a special permit to drill wells Nos. 1, 2, 3, 4, on the W. L. Fuller 2.33 acre tract, Sanches Survey, Gregg County, Texas:

Now, Therefore, It Is Ordered that the motion for rehearing filed by the Sun Oil Company and Magnolia Petroleum Company be in all things denied.

Entered at Austin, Texas, on this the 10th day of July, 1939.

(Signed) LON A. SMITH,
Chairman.

Attest:
C. F. PETET,
Secretary.

....., Commissioner,

(Signed) JERRY SADLER,
(Seal) Commissioner.

/zk.

State of Texas,
County of Travis.

I, C. F. Petet, Secretary of the Railroad Commission of the State of Texas, do hereby certify that the attached instrument, described as follows:

Order of the Railroad Commission of Texas, dated July 10, 1939, in re Case No. 26,868, Rule 37. Entitled: "Motion for Rehearing by Sun Oil Company and Magnolia Petroleum Company"

is a true and correct copy of the original instrument now on file in the Railroad Commission, and in my custody as Secretary and Custodian of the files of the Railroad Commission.

Witness my hand and seal of the Railroad Commission of Texas, this the 17th dy of February, 1940.

(Signed) C. F. PETET,
(C. F. Petet),
Secretary.

Mr. Rauhut:

On our plea of *res judicata* we desire to offer in evidence a certified copy of the Sun Oil Company's petition in Cause No. 54,743, styled Sun Oil Company vs. Railroad Commission of Texas et al., in the 53rd District Court of Travis County, Texas. This is an amended petition filed January 31, 1935; and judgment of the District Court of Travis County in that case, dated January 31, 1935. This judgment is styled and numbered differently from the petition, but it recites that there were two cases, and that the cause in which this petition was filed was consolidated with the other cause and tried together. This judgment cancels a permit which had been granted to Mamie Hammonds to drill on this same tract at a location 412 feet from the north line; and I would like to ask in this con-

nection that it be agreed that the permit involved in that suit was on the identical strip that is involved in the Burford application.

Mr. Cale:

As far as the Railroad Commission of Texas is concerned, Your Honor, we have agreed that the 2.33 acre tract, so far as we know, is the same tract. We will not be able to agree that the permit or application sought in that original suit was at the same location.

Mr. Rauhut:

We don't ask that. Now, Mr. Kuykendall, do you likewise agree that this permit involved in the law suit, papers in which have just been offered, involved this identical strip?

Mr. Kuykendall:

Well, I assume that it is, but I will check into it and if it is not correct, why, I will report back.

The Court:

All right.

(Thereupon the Amended Petition and the Judgment above referred to were marked for identification as Plaintiff's Exhibits No. 11 and No. 12, respectively,—same being here set out in order as follows:)

167 PLAINTIFF'S EXHIBIT No. 11.

In the 53rd District Court of Travis County, Texas.

Sun Oil Company,
vs. No. 54743.
Railroad Commission of Texas, et al.

To the Honorable Judge of said Court:

Now comes Sun Oil Company, hereinafter styled "Plaintiff", and with leave of Court first had filed this its First Amended Original Petition and still complaining of the Railroad Commission of Texas and its members, Lon A. Smith, C. V. Terrell and E. O. Thompson, and O. O. Hammonds and Mamie S. Hammonds, hereinafter styled "Defendants", and for cause of action, Plaintiff would respectfully show to the Court:

1.

Plaintiff is a private corporation duly and legally incorporated under and by virtue of the laws of the State of New Jersey, with a permit to do business in Texas, and whose principal place of business in the State of Texas is at Dallas, Dallas County, Texas.

The Railroad Commission of Texas was duly created under the laws and Constitution of the State of Texas, and Lon A. Smith, C. V. Terrell, and E. O. Thompson are the duly elected, qualified and acting members of said Commission and reside in Travis County, Texas, and the said Lon A. Smith is Chairman of said Commission, and C. F. Petet, who resides in Travis County, Texas, is Secretary of the said Commission, and such Commission and its members are empowered and charged by law with the duties of enforcing the laws of the State of

Texas providing for the conservation of oil and gas and the prevention of waste thereof.

The Defendants, O. O. Hammonds and wife, Mamie S. Hammonds, reside in Oklahoma County, Oklahoma.

1. a.

That the purported strip of 2.81 acres described hereinbelow does not in fact exist between the two 50 acre tracts described below, and the order hereinafter complained of is arbitrary and capricious because granted to a stranger to the title to said leasehold estate of plaintiff and Magnolia Petroleum Company who were and are now in actual physical possession of said land under their alleged leasehold assignments.

2.

On November 26, 1919, said Railroad Commission adopted and promulgated Rule 37, as follows:

"Rule 37. No well for oil or gas shall hereafter be drilled nearer than three hundred (300) feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than one hundred and fifty (150) feet to any property line; provided, that the Commission, in order to prevent waste or to protect vested rights, will grant exceptions permitting drilling within shorter distances than as above prescribed, upon application filed fully stating the facts, notice thereof having first been given to all adjacent lessees affected thereby."

Said rule was in full force and effect on the dates hereinafter alleged to and including February 28, 1931.

3.

By instrument dated July 31, 1930, recorded in Volume 4, page 1, of the records of Gregg County, Texas, the owners of the fee conveyed to J. A. Reynolds an oil and gas mining lease, among other lands, on the following described tract in Gregg County, Texas, to-wit:

"A part of the D. Sanchez H R survey, situated about 8 miles NW of Longview, Texas, Beginning at a stake in the South line of the Alexander Survey, being the NW corner of a tract surveyed for J. B. Harley and now owned by Bob Smith;

"Thence West, passing the SW corner of the M. Irwin Survey at 731 vrs. on 751.4 vrs. to a corner in the S. line of the said Irwin Survey;

"Thence South 751.4 vrs. to a stake on the West bank of a branch from which a Maple brs. S. 77 E. 7 vrs.;

"Thence E. 751.4 vrs. to a large Sweet Gum in a branch for corner;

"Thence North 751.4 vrs. to the place of beginning, and containing 100 acres of land, more or less."

By instrument dated September 15, 1930, recorded in Volume 60, page 115 of the Gregg County, Texas, records, the said J. A. Reynolds assigned said lease on the lands next above described to Defendant, Mamie S. Hammonds, using the identical description and filed notes as quoted next herein above.

On December 18, 1930, by an instrument recorded in Volume 67, page 47 of the Deed Records of Gregg County, Texas, Defendants O. O. Hammonds and Mamie Ham-

monds, first describing said original lease as hereinabove quoted as to description and field notes, assigned the same to Claude Bell and R. A. Grady, as follows, to-wit:

"In so far as it covers the E fifty (50) acres of the above described land."

On February 28, 1931, by instrument recorded in Vol. 75, page 86 of the Deed Records of Gregg County, Texas, the Defendants, O. O. Hammonds and Mamie S. Hammonds, first describing said lease as first hereinabove quoted as to description and field notes, assigned the same to Plaintiff as follows, to-wit:

"In so far as it covers the West Fifty (50) acres of the above described tract of land."

That the Defendant, Mamie S. Hammonds, joined by her husband, filed with the Railroad Commission an application to drill a well on the 2.81 acre tract described hereinbelow, and that said application was duly set for hearing by the Railroad Commission, and notices were sent out to all adjoining lessees, and thereafter, on the 11th day of October, 1934, hearing upon said application was had before the Railroad Commission at which hearing the Sun Oil Company and the Magnolia Petroleum Company each appeared and offered evidence at such hearing, showing the facts alleged in this petition, and each protested the granting of said permit on all the grounds herein set out, and that the evidence introduced at said hearing showed that the strip herein involved had been segregated from the remainder of the leased land held by Mamie S. Hammonds in the manner herein stated; that the Railroad Commission, at the conclusion of said hearing, thereafter entered its order as set out hereinbelow.

4.

That on the 11th day of October, 1934, the Railroad Commission entered an order, granting the Defendant Mamie S. Hammonds a permit to drill a well for oil and gas on a strip of land alleged to contain 2.81 acres in the Dolores Sanchez Survey, Gregg County, Texas, said strip of land being midway between the east and west lines of the 100 acre tract, and extending from the North to the South lines thereof; being approximately 50 feet wide East and West by approximately 2100 feet long North and South, said well to be spaced on said strip 412 feet from the North line and midway between the East and West lines of the said strip. Defendants O. O. Hammonds and Mamie S. Hammonds claiming that by actual measurement between its four corners, there is contained in said tract as originally leased as hereinbefore alleged, 102.81 acres of land, and that the 2.81 acre strip in the center of said tract lies West of the 50 acres first assigned by them to Bell and Grady, and East of the 50 acres assigned by them to Plaintiff, all as hereinbefore alleged, and that they are the owners of the leasehold estate in, on and to the same, and that same was not included in their assignment to Bell and Grady nor in their assignment to the Plaintiff.

That this Plaintiff filed a Motion for Rehearing on such application asking that the Railroad Commission deny the permit upon such re-hearing, on the grounds alleged herein, which grounds were set up in the Motion for Rehearing, and such motion was, without further hearing, overruled by the Commission on the 7th day of November, 1934.

That under the terms and provisions of said Rule 37 no oil or gas well could be drilled closer to a property or division line than 150 feet nor closer than 300 feet from any drilling or completed oil or gas well, and no exception to said rule could be granted by the Railroad

Commission except for the purpose of protecting vested rights or for the purpose of preventing waste of oil and gas. The aforesaid Rule 37 applied to the drilling of oil and gas wells in what is known as the East Texas field, of which the lands herein mentioned as a part, and continuously remained in effect since the date of its adoption, except as amended as hereinafter shown, and is a valid and binding rule and regulation. Said rule applied to the drilling of wells in the East Texas field, in the form in which said rule was originally adopted, until September 5, 1931, at which time said rule was amended to provide that no well should thereafter be drilled for oil or gas in the East Texas field at any point less than 660 feet from any drilling or completed well, and at any point less than 330 feet from any property or division line.

Plaintiff shows that the spacing requirements of Rule 37 as originally promulgated have not been lessened by any of the amendments thereto applicable to the East Texas field, but that each and all of said amendments thereto, commencing with the amendments of September 5, 1931, have provided that wells should be spaced at least 660 feet from any drilling or completed well and 330 feet from any property or division line, provided, however, that the Commission, in order to prevent waste or to protect vested rights will, after hearing, grant exceptions permitting drilling within a less or shorter distance than prescribed in such amendments, upon application duly filed stating the facts, notice of such application having first been given to all adjacent lessees affected thereby and hearing having been held thereon.

Since Rule 37 was amended in so far as it applies to the East Texas field on or about September 5, 1931, said original rule, or some amendment thereto requiring wells

to be spaced 330 feet from any property or division line and 660 feet from other drilling or completed wells, has been in effect continuously at all times, constituting a continuous regulation governing the spacing and drilling of oil wells in the East Texas oil field.

On June 13, 1933, effective as of that date, Rule 37 was further amended by the Railroad Commission as applicable to the East Texas field so as to read as follows, to-wit:

"Rule 1: (a) Rule, 37, adopted November 26, 1919, is hereby amended in so far as it applies to the East Texas field so as to hereafter read as follows: 'No well shall hereafter be drilled for oil or gas at any point less than six hundred and sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than three hundred and thirty (330) feet from any property or division line, provided, however, the Commission in order to prevent waste, or to protect vested rights, or to protect any property against undue drainage by reason of the operation of the wells of any other operator, will after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing; and provided further than in cases of forced offsets the Commission may grant exceptions without waivers or hearing when it is evident that the wells desired are necessary to protect the properties on which it is proposed to drill them.'"

Said amended rule is a valid and binding rule and regulation and governs the spacing and drilling of oil wells in the East Texas field and has continuously remained in effect since the date of its adoption until May 29, 1934, at which time such rule was further amended, as hereinafter shown. Under said amended rule dated June 13, 1933, no one is authorized to drill an oil or gas well in the East Texas field at any point less than 660 feet from any drilling or completed well or less than 330 feet from any property or division line, except by special permission from the Railroad Commission granted under the terms of said rule for the purpose of preventing waste or to protect vested rights or to protect any property against undue drainage by reason of the operation of wells by other operators in the field.

On May 29, 1934, effective as of that date, Rule 37 was further amended by the Railroad Commission as applicable to the East Texas field so as to read as follows, to-wit:

"It Is Hereby Ordered by the Railroad Commission of Texas that Rule No. 1 of Subdivision II (Drilling) on Division 3 being special rules governing the East Texas field, is hereby amended so as hereafter to read as follows:

"*Rule 1. Spacing Rule.* No well for oil or gas shall hereafter be drilled in said East Texas field nearer than 660 feet to any other completed or drilling well on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line, or subdivision line; provided that the Commission in order to prevent waste, or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to pre-

vent the confiscation of property. When an exception to such rule is desired, application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equaling four hundred feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling, and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten days notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect the property belonging to applicant from confiscation. All pending applications shall be amended to conform to this rule before being acted upon.

"No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule, and no well drilled under such a special permit which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas; and any such well so drilled in violation of said rule or in violation of a permit granted as a special exception to said rule shall be plugged.

"The order entered by this Commission on August 30, 1933, commonly designated as the direct and equidistance offset order is hereby rescinded, annulled and shall be of

no further force and effect. All other rules, regulations and orders of this Commission which conflict with the terms and provisions of Rule No. 1 as hereby amended and promulgated are hereby declared to have no further application to wells in said East Texas field to the extent of such conflict.

"In the adoption and promulgation of this order it is here declared that the Commission intends to adopt each phrase, sentence, and paragraph, separately and independently of each other such phrase, sentence and paragraph, and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion."

In connection with said amendment dated May 29, 1934, and supplementing same, the Railroad Commission on said date entered an order applicable to the East Texas field, reading as follows:

"It Is Ordered by the Railroad Commission of Texas that in applying Rule 37 (Spacing Rule) of state-wide application and in applying every special rule with relation to spacing in every field in this State no subdivision of property made subsequent to the adoption of the original spacing rule will be considered in determining whether or not any property is being confiscated within the terms of such spacing rule, and no subdivision of property will be regarded in applying such spacing rule or in determining the matter of confiscation if such subdivision took place subsequent to the promulgation and adoption of the original spacing rule."

Said amendments to the spacing rule dated May 29, 1934, are valid and binding rules and regulations and govern the spacing and drilling of oil wells in the East

Texas field, and have continuously remained in effect since the date of their adoption and are now in effect. Under said amended rule dated May 29, 1934, no one is authorized to drill an oil or gas well in the East Texas field at any point less than 660 feet from any drilling or completed well or less than 330 feet from any property or division line, except by special permission from the Railroad Commission granted under the terms of such rule for the purpose of preventing waste or for the purpose of preventing confiscation of property drainage of oil therefrom through wells on adjoining tracts, provided the particular property on which it is proposed to drill a well in exception to said rule has not been subdivided from other properties or created into separate tracts from adjoining properties for development purposes since November 26, 1919.

5.

Plaintiff brings this suit as an appeal from said order of the Defendant Commission under the Revised Civil Statutes of Texas.

6.

Plaintiff would show that the order of the Defendant Railroad Commission, complained of, is invalid for the following reasons:

1. The land as originally leased by the fee owners on July 31, 1930, was rectangular in shape, was in one contiguous body, and was susceptible of development for oil and gas as a whole in strict conformity with said Rule 37, and with the conservation laws of the State of Texas, then in force, and neither the fee owners nor their lessee, nor any assignee of their lessee, had, or thereafter acquired, any vested right to develop the same for oil and

gas except in conformity with Rule 37, and the conservation laws of the State of Texas.

2. That if said original 100 acres actually contain 102.81 acres, which is not admitted, but is expressly denied by Plaintiff, by their assignment of the East 50 acres of said tract to Bell and Grady, as aforesaid, and by their assignment of the West 50 acres of said tract to the Plaintiff, as aforesaid, the Defendant Hammonds waived and divested themselves of all and every vested right to develop said land or any part thereof for oil and gas, because said claimed strip 50 feet East and West by 2100 feet North and South is not capable of development in conformity with Rule 37, or under any exception to said rule, and with the conservation laws of Texas; that Defendants O. O. Hammonds and Mamie S. Hammonds by the two assignments of 50 acres each herein alleged, segregated the strip herein involved from the remainder of said land in view of Rule 37 and of the conservation laws of Texas, and are now estopped from drilling, cannot drill said strip for oil and/or gas, and from claiming and cannot vested right to drill same for said purpose.

3. Because said order is unreasonable, arbitrary, and discriminatory and should be annulled, in that said order permits the Defendants Hammonds to drill a well for oil and gas on a 2.81 acre narrow strip of land 50 feet wide and 2100 feet long, and within 25 feet of Plaintiff's east line; that if drilled, a location 50 feet to the East, and another 50 feet to the West of said location will be forced thereby, or three wells on a line 100 feet in length, which said wells, thus grouped, will cause a low pressure area when produced, and will cause great waste of oil and gas and of pool energy as will be hereinafter shown, all in violation of the letter and spirit of the conservation laws of Texas, and in direct contravention of Rule 37 of the Defendant Commission, and enables the Defendants O. O.

Hammonds and Mamie S. Hammonds, to unfairly compete with this Plaintiff in producing oil and gas from said leasehold estate.

7.

Plaintiff says that it purchased the oil and gas mining lease on the West 50 acres of said original tract from the Defendants O. O. Hammonds and Mamie S. Hammonds, and that the said Defendants sold said leasehold estate to this Plaintiff in view of the conservation laws of Texas, and in view of said Rule 37, then in force, and upon the implied and express agreement, representation and assurances, as expressed in said assignment, that the distances between the four corners of said original tract, each, respectively, was 751.4 varas, and the courses from and to the beginning corner were due west, south, east and north, respectively, and that the West 50 acres of said original tract so assigned to Plaintiff, was and would be contiguous to the East 50 acres of said tract theretofore assigned to the said Bell and Grady, and that the West line of said West 50 acres would be coincident with the West line of said original 100 acre tract, and with the implied assurance that the four lines of Plaintiff's said estate thus assigned would never be offset by wells drilled upon said original tract closer to Plaintiff's said property lines than 150 feet, and that Plaintiff would never be required to drill a well, and that no well would be drilled closer than 150 feet to the dividing line between the East and West 50 acres of said original 100 acre tract; that in reliance thereon, and in perfect good faith, Plaintiff has developed its leasehold estate along its East boundary line in consonance with said Rule 37; that in September, 1931, Defendant Railroad Commission amended its said Rule 37 so as to prohibit drilling wells for oil and gas in the East Texas field at a closer distance than 330 feet from prop-

erty lines and 660 feet from drilling or completed wells, and this Plaintiff has developed its said leasehold estate along its East line in consonance with such amended Rule, spacing its wells full 330 feet West from its East line at a cost of approximately Fifteen Thousand ($15,000) Dollars for each well so drilled, and in full reliance upon said implied agreement and assurance of the said Defendants Hammonds shall be permitted to drill said claimed strip of land for oil and gas, Plaintiff will be required to offset each said well so drilled by an equi-distance West offset, unnecessary to a proper development of Plaintiff's leasehold estate but for such drilling by Defendants Hammonds to its great and irreparable injury. Each such offset well will cost approximately Fifteen Thousand ($15,000) Dollars and Defendants O. O. Hammonds and Mamie S. Hammonds being non-residents of the State, a moneyed judgment can not be had against them, or either of them, because no personal service can be had upon them in Texas, and Plaintiff has no remedy in law; that Plaintiff can not obviate the injury to it by drilling such offset wells in that the wells now drilled on Plaintiff's said lease are adequate to drain all of the recoverable oil in and under such area, and by grouping wells along said narrow strip will augment the injuries to Plaintiff as will be hereinafter alleged, and will occasion great waste of oil and pool energy as will be shown, and that its right to offset such wells is not an adequate remedy, and Plaintiff has no adequate remedy in law.

8.

Plaintiff says that by reason of the facts alleged, Defendants O. O. Hammonds and Mamie S. Hammonds are estopped from drilling said strip of land; that the wells now on said 100 acre tract are sufficient to drain all of the oil and gas from and under said tract in the area where Defendants O. O. Hammonds and Mamie S. Ham-

monds seek to drill, and that the location complained of is not forced; and in the alternative, Plaintiff says that in the event the said 100 acre tract is not now sufficiently developed for oil and gas purposes in order to recover all of the oil and gas underlying said tract, that the said 100 acre tract, taking the same as a whole tract, including the purported 2.81 acres excess, can be adequately drilled and developed for oil and gas purposes so as to recover all of the oil and gas lying thereunder to which the lease-owners and fee and royalty owners of the said entire tract are entitled to recover under and by virtue of the rules and regulations of the Railroad Commission and the conservation laws of the State of Texas, and in accordance with the spacing provisions of Rule 37, without the necessity of drilling on the 2.81 acre tract, or any part thereof; that the said 2.81 acre tract, as a part of the entire 100 acre tract, is now adequately protected from drainage by any surrounding leases, of which it did not formerly form a part of a whole tract; that if said strip of land actually exists on the ground as additional to the East and West 50 acres of said original tract, and if the same was not, as a matter of fact and law, included in the said assignments to Bell and Grady, and to Plaintiff, this Plaintiff here now offers to pay the Defendants Hammonds the same per acre consideration for the said 2.81 acre strip as was paid by Plaintiff to the said Defendants for the West 50 acres of the said original tract, and here now proposes and offers, in good faith to do full equity to the Defendants Hammonds to the end that the injuries to Plaintiff here complained of may be obviated, and its property and the State's natural resources be conserved.

8-a.

That the Plaintiff, Sun Oil Company, claims title to the oil and gas lease under the portion of said land as herein alleged under an assignment of 50 acres thereof

executed by Mamie S. Hammonds and her husband, O. O. Hammonds, on February 28, 1931; recorded in Vol. 75, page 86, of the Deed Records of Gregg County, Texas; that the said assignment contained in substance the following provision:

"And for the same consideration, the undersigned for herself and her heirs, successors and representatives, does covenant with the said assignee, their heirs, successors, or assigns, that Mrs. Mamie S. Hammonds, is the lawful owner of the said lease and rights and interest thereunder and of the personal property thereon or used in connection therewith; that the undersigned has good right and authority to sell and convey the same, and that said rights, interest and property are free and clear from all liens and encumbrances, and that all rentals and royalties due and payable thereunder have been duly paid and that the undersigned will warrant and defend the same against the lawful claims and demands of all persons whomsoever."

That thereby the said Mamie S. Hammonds and her husband O. O. Hammonds, are estopped to claim any right in and to any of the oil and/or gas underlying the 50 acres of land covered by the said assignment, and to directly or indirectly withdraw any of said oil and/or gas from beneath said land.

That the Intervener, T. S. Schroeder, claims title to the strip of said land he contends was left when the two assignments of 50 acres each herein referred to were executed. That in the assignment to him, executed by Mamie S. Hammonds and husband, is included the following provision and recital:

"Thence west to the place of beginning; containing 2.81 acres of land; it being intended hereby to assign all the

leasehold interest which we still own in the said W. L. Fuller 100 acre tract;"

That thereby, the said T. S. Schroeder is charged with notice of all the provisions and recitals of previous assignments of portions of said lease made by the said Mamie S. Hammonds and or her said husband, and with notice and knowledge of such facts as would have caused a person of ordinary prudence to have made a reasonably diligent investigation, and that a reasonably diligent investigation, if made by said Schroeder, would have lead to knowledge on his part that the said Mamie S. Hammonds and husband had executed the said assignments of 50 acres each herein alleged and incorporated therein the said provision herein copied and claimed as warranties of title.

That if the well involved herein is drilled, it will be within approximately 25 feet of the East and West boundary lines of the said strip, and if permitted to produce oil, it will drain oil from beneath the leases of the Sun Oil Company to the west thereof, and the Magnolia Petroleum Company to the East thereof, and thereby the oil and or gas conveyed under said assignments to said companies will be withdrawn and appropriated by the Defendants and Intervener in violation of the said assignments and covenants therein. That it is impossible to accurately determine or prove the amount of oil that will be drained from beneath the said adjoining land, if drilling of said well is permitted, and that the East Texas Oil Field and the properties herein involved will probably produce oil for ten or more years, and any cause of action for drainage of adjoining land by said well will in large part be barred by the statutes of limitation before the expiration of such period, and that since such drainage is impossible of definite proof, Plaintiff has no adequate remedy at law.

That at the time of the subdivision or segregation of the 2.81 acre strip from the remainder of the 100 acre tract, the land was situated within what is now a part of the East Texas Oil Field, and at which time the land was considered valuable for oil and gas purposes, and numerous tracts, including the 102.81 acre tract, were being leased at such time for oil and gas development.

9.

Plaintiff says that the said original tract of land including the strip of land herein involved, are located in what is designated by the Defendant Railroad Commission as the East Texas field; that the entire original tract is underlaid with a woodbine sand which is saturated with oil and gas, and which constitutes a common oil pool; that the lifting force which forces the oil through said sands, into and through wells drilled therein is hydrostatic pressure vertically and from the westward on the western edge of said pool; that if said well is permitted to be drilled by the Defendants O. O. Hammonds and Mamie S. Hammonds, an equidistant offset well will be forced to the East and West thereof, thus forcing the drilling of three wells along a line 100 feet in length, and when produced, will occasion a low pressure area at such point, to equalize the pressure in and about such area, oil will be forced toward such point from surrounding high pressure areas at a great sacrifice and loss of energy. With lowering of pressure gas wastage will start, which when exhausted or diminished increases the viscosity of the crude, thus leaving great quantities of oil in place in such structure; that one well at such location is amply sufficient to drain fifteen acres of recoverable oil, and to drain all of the recoverable oil in and under fifteen acres of land; that the three wells located as herein alleged will eventually exhaust great and inestimable quantities of energy from, in and under Plaintiff's leasehold estate,

and from the lands lying east thereof, and will leave great and inestimable quantities of oil in place thereunder, which can never thereafter be recovered, to the great and inestimable loss and injury to Plaintiff and to the State, and Plaintiff has no remedy at law to prevent it.

10.

Plaintiff says that the injuries herein alleged and complained of can not be prevented by drilling an equidistant offset to Defendants Hammonds' said location because one well is sufficient, in said area, to drain all of the recoverable oil from and under fifteen acres of land; that an equidistant offset well on Plaintiff's land West from said location can not prevent the Defendants Hammonds' proposed well, located as it is, 25 feet East from Plaintiff's East line, from draining a great and inestimable quantity of oil and gas from Plaintiff's said land, title to which was acquired, as aforesaid, from the Defendants O. O. Hammonds and Mamie S. Hammonds, for a valuable consideration, and the Defendants O. O. Hammonds and Mamie S. Hammonds warranted title to the same by general warranty in writing; that because of the migratory nature of oil passing from high to low pressure structure, it is impossible to know or to approximate with reasonable certainty the amount of oil in barrels that will be drawn from Plaintiff's leasehold estate, but the Plaintiff says that it will be great and inestimable, and that Plaintiff has no adequate remedy at law to prevent it; that this Plaintiff here now pleads such general warranty of the Defendants O. O. Hammonds and Mamie S. Hammonds, as expressed in their assignment of the said leasehold estate to this plaintiff in estoppel of their claim or right to drill said narrow strip; that by reason of all of the facts hereinbefore alleged the action of the Defendants Hammonds in drilling and in attempting to drill said well, and in developing and attempting to de-

velop said long narrow strip of land for oil and gas, is a fraud upon this Plaintiff, which should be restrained in equity, Plaintiff being without remedy in law as hereinbefore alleged; that by drilling an equidistant west offset to said location complained of herein, Plaintiff will but augment the injuries complained of, in that the group of wells drilled at such close proximity one to the other will produce a low pressure area as hereinbefore alleged, which for the reasons alleged, will result in great waste of petroleum oil that would otherwise be recovered by the Plaintiff and the lessees to the east and north, because of the exhaustion of pool energy as aforesaid, quantities of oil will be left in place with no propelling and lifting force to remove it, and can never thereafter be recovered, to the great and inestimable injury and damage to this Plaintiff. Plaintiff having exhausted its remedy without avail is without remedy in law to prevent the injuries complained of, that the defendants are unable to respond in damages to this plaintiff.

Wherefore, Plaintiff prays that a temporary restraining order issue herein, restraining the Defendants O. O. Hammonds and Mamie S. Hammonds, their agents, servants, employees, contractors and legal representatives from drilling, and from attempting to drill, and from permitting the drilling of such well on said strip of land, and or from producing oil from any such well location no well having been begun at said location to this date; that this cause be set for hearing by the Court on a day certain, and that the Defendants, and each of them, be notified thereof and cited in terms of law to appear and show cause why a temporary injunction should not issue, and that on such hearing, a temporary injunction issue so restraining and enjoining the Defendant O. O. Hammonds, and wife, Mamie S. Hammonds, their agents, servants, employees, contractors and legal representatives; that the said Defendants, and each of them, be cited in

terms of law to appear and answer herein, and that upon trial hereof, Plaintiff have judgment decreeing said 2.81 acre strip to be a part and parcel of Plaintiff's leasehold estate as assigned to it, and in any event, that the order of the Defendant Railroad Commission be in all things annulled, canceled and held to be invalid, and of no force and effect, and that the temporary injunction be made permanent against the Defendants O. O. Hammonds and Mamie S. Hammonds, their agents, servants, employees, contractors and legal representatives; that if it shall be determined that the said 2.81 acre strip exists and that same was not included in the assignment to Plaintiff of the leasehold estate in, on and to the West 50 acres of the said original tract, then and in that event, that Defendants O. O. Hammonds and Mamie S. Hammonds be required to accept from Plaintiff the same per acre consideration therefor as was paid and accepted for the said West 50 acres of said original tract, the Plaintiff, in any event, being ready, willing, and hereby proposing to do full equity to and by the Defendants O. O. Hammonds and Mamie S. Hammonds, and that all title and claim of the said Defendants in and to the said 2.81 acre strip be divested out of them, and each of them, and that title in and to the leasehold estate in, on and to the same be vested in this Plaintiff, for all costs of suit, and for full relief in law and in equity.

E. R. PEDIGO,
T. L. FOSTER,
J. W. TIMMINS,
POWELL, WIRTZ, RAUHUT & GIDEON.

(Signed) By W. S. GIDEON,
Attorneys for Plaintiff,
Sun Oil Company.

Indorsed: No. 51,743, in the 53rd District Court, Travis County, Texas; Sun Oil Company vs. Railroad Commission,

et al; Plaintiff's First Amended Original Petition. Filed January 31st, 1935, Geo. H. Templin, District Clerk.

The State of Texas,
County of Travis.

I, Geo. H. Templin, Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Plaintiff's Amended Original Petition in Cause No. 54,743 wherein Sun Oil Company is Plaintiff and Railroad Commission, et al, are Defendants, as the same appears on file in this office.

Given under my hand and seal of office, at Austin, Texas, this the 4th day of February, A. D. 1941.

(Signed) GEO. H. TEMPLIN,
(Geo. H. Templin),
(Seal) Clerk of the District Courts
of Travis Co., Texas,
By ....., Deputy.

192 PLAINTIFF'S EXHIBIT No. 12.

In the 53rd District Court, Travis County, Texas,
Regular Term, 1935.

Magnolia Petroleum Company, et al.,
vs. No. 54,769.
Railroad Commission of Texas, Mamie S. Hammonds, et al.

On the 31st day of January, 1935, came on to be heard the above entitled and numbered cause, which cause was consolidated, by agreement of the parties, with Cause No. 54,743, styled Sun Oil Company vs. Railroad Commission, et al, on the docket of said Court; and came Plaintiffs, Sun Oil Company and Magnolia Petroleum Company,

by their attorneys, the Defendants, Railroad Commission of Texas and its members by Assistant Attorney General Harry Pollard, and Defendants Mamie S. Hammonds and husband, O. O. Hammonds, and Intervener T. S. Schroeder by their attorneys, and all parties announced ready for trial, whereupon, the Plaintiffs presented their pleadings to the Court, and the Defendants thereupon presented a general demurrer, which general demurrer was sustained by the Court, whereupon each of the Plaintiffs asked leave to amend, and with leave of Court did amend and file their First Amended Original Petitions, whereupon the Defendants presented a general demurrer to each First Amended Original Petition of the Plaintiffs, which general demurrer was in all things overruled; whereupon, the Defendants Mamie S. Hammonds and husband, O. O. Hammonds, and the Intervener T. S. Schroeder presented to the Court certain Exceptions, all of which were overruled, except the ones specifically designated hereinbelow, to which judgment of the Court said Defendants duly excepted, the Court sustaining Special Exceptions Nos. 28, 29 and 35, to which order sustaining said three Special Exceptions each of the Plaintiffs duly excepted in open Court; whereupon, all parties then announced ready for trial upon the merits, and no jury having been demanded, and all matters of fact, as well as of law, having been presented to the Court, and the Court having heard the pleadings, evidence and the argument of counsel, and before the case was closed, having given Plaintiffs leave to file their First Trial Amendment, is of the opinion and so finds that the law and the facts are with the Plaintiffs, and that they should recover as prayed for in their several Petitions.

It Is, Therefore, Ordered, Adjudged and Decreed by the Court that the Defendants, Mamie S. Hammonds and husband, O. O. Hammonds, and Intervener, T. S. Schroeder, their agents, servants, employees and legal representatives,

and the agents, servants and emplayees of each of them, be and they are hereby perpetually enjoined from drilling or attempting to drill, and from permitting to be drilled, a well for oil and gas, and from producing, permitting to be produced, and from attempting to produce oil and gas under permit granted by the Railroad Commission by order dated October 11, 1934, on application of Mrs. Mamie S. Hammonds Rule 37 Case No. 10,856 on the Oil and Gas Docket of the Railroad Commission of Texas on the following described land:

"A strip of land in the D. Sanches H. R. Survey in Gregg County, Texas, consisting of 2.21 acres, said strip being part of the land described in Plaintiff's Petition herein, and said strip more particularly described as follows:

"Beginning at a point 1019.5 ft. East of the Northwest corner of the W. L. Fuller 100 acre tract the same point being described as follows:

"A large iron stake from which a large red oak brs. S 22-30 W. a distance of 20.0 ft. The same being the NE corner of the Reppond land, to the West; at an iron pipe driven in the ground in the South line of the W. L. Fuller 67 acre tract to the North;

"Thence South a distance of 2136.3 ft. to an iron stake set in the North line of the J. W. Fuller for the S. W. corner of this survey;

"Thence East a distance of 57.29 ft. to an iron stake set for the SE corner of this survey the same also being in the N line of the W. L. Fuller tract.

"Thence North a distance of 2136.3 ft. to an iron stake set for the NE corner of this survey in the South line of the J. W. Fuller 67 acre tract;

"Thence West to the place of beginning containing 2.21 acres of land."

It Is Further Ordered by the Court that the said permit above described be and the same is hereby set aside and held for naught, and that all costs herein be adjudged against the Defendants and Intervener for which costs let execution issue;

To which judgment the Defendants Railroad Commission of Texas and its members and Mamie S. Hammonds and husband, O. O. Hammonds, and the Intervener T. S. Schroeder, in open Court duly excepted, and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

C. A. WHEELER,
Judge, 53rd District Court.

O. K.:
MOODY & ROBERTSON,
Attys. for Magnolia Petroleum Co.

O. K.:
SUN OIL CO.,
POWELL, WIRTZ, RAUHUT & GIDEON,

O. K. as to form:
JULIUS H. RUNGE,
Attorney for T. S. Schroeder.

(Indorsed): No. 54,769. In the 53rd District Court, Travis County, Texas. Magnolia Petroleum Company vs. Railroad Commission of Texas, et al. Judgment. Filed in the 53 District Court of Travis County, Texas, Feb. 1, 1935. Geo. H. Templin, District Clerk.

The State of Texas,
County of Travis.

I, Geo. H. Templin, Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Judgment in Cause No. 54,769 wherein Magnolia Petroleum Company is Plaintiff and Railroad Commission of Texas, et al, are Defendants, as the same appears on file and of record in this office, in Minute Book 51, Page 385.

Given under my hand and seal of office, at Austin, Texas, this the 4th day of February, A. D. 1941.

(Signed) GEO. H. TEMPLIN,
(Seal) Clerk of the District Courts of Travis Co., Texas,
By ....., Deputy.

Mr. Rauhut:

Your Honor, counsel has mentioned that there was a different location involved, which is correct, and we desire to offer a copy of the order granting the permit that was involved, and which states where it was and the grounds on which it was granted. The permit in that case was granted on both grounds of exception to the spacing rule, which is of significance, we think, in this case. If Your Honor please, this is a true copy of the order, excepting the signatures; it is a copy that is issued by the Deputy Supervisor.

The Court:

Well, counsel can look at these exhibits during the lunch hour, and if there is anything they want to take exception to then they can require you to prove it more definitely.

(Thereupon the Order referred to above was marked for identification as Plaintiff's Exhibit No. 13,—same being here set out as follows:)

197 PLAINTIFF'S EXHIBIT No. 13.

State of Texas.

Railroad Commission of Texas,
Austin.

Hearing on Application of Mamie S. Hammonds.

Case No. 10,856,—Rule 37.

Applicant:
Mrs. Mamie S. Hammonds, 623 East 18th, Oklahoma City, Oklahoma.

The re-hearing on the application of Mrs. Mamie S. Hammonds in the above styled case having been this day considered by the Railroad Commission of Texas, and it appearing to the Commission that notice of said public hearing has been given to adjacent lessees for the time and in the manner required by law, and said adjacent lessees having appeared at said public hearing, and that said applicant has offered in writing to waive any right of protest against the drilling of offset wells; and it further appearing to the Commission from satisfactory evidence adduced on said hearing held on September 14, 1934, that the drilling of said Well No. 1 on the W. L. Fuller 2.21 acres at a distance 412 feet from the North line of said W. L. Fuller tract, and midway between the East and West lines of said 2.21 acre tract, and the drilling of offset wells thereto, would not cause waste within the meaning of that term as used in the conservation statutes of the State of Texas, but would in fact prevent waste as that term is used in the statutes, and the Commission having determined that an exception to such Rule 37 is necessary in this case to prevent waste and to protect the property above described from confiscation;

Now, Therefore, It Is Hereby Ordered that the application of Mrs. Mamie S. Hammonds for permit to drill Well No. 1 as an exception to Rule 37 on the W. L. Fuller 2.21 acre tract in the Dolores Sanchez Survey, Gregg County, Texas, at the location above described be, and it is hereby granted to prevent waste and to prevent the confiscation of property.

Entered at Austin, Texas, this the 11 day of October, A. D. 1934.

The above and foregoing is a true and correct copy of an order of the Railroad Commission of Texas entered on the above date.

LATEN STANBERRY,
Chief Supervisor.

Mr. Rauhut:

On our plea that the Railroad Commission was without jurisdiction of Burford's application because of the pendency of a law suit in the District Court of Travis County, to cancel an outstanding permit at the time on this same tract, we offer in evidence certified copy of the plaintiff's petition in Case No. 53,915, Sun Oil Company vs. Railroad Commission of Texas, et al., in the 53rd District Court.

(Thereupon the Petition referred to above was marked for identification as Plaintiff's Exhibit No. 14,—same being here set out as follows:)

199 PLAINTIFF'S EXHIBIT No. 14.

In 53rd District Court, Travis County, Texas.

Sun Oil Company,
vs. No. 53,915.
Railroad Commission of Texas, et al.

To the Honorable C. A. Wheeler, Judge of said Court:

Sun Oil Company is the plaintiff. The Railroad Commission of Texas, and O. O. Hammonds and Mamie S. Hammonds are the defendants.

I.

Plaintiff is a private corporation duly and legally incorporated under and by virtue of the laws of New Jersey, with a permit to do business in Texas, and whose principal place of business in the State of Texas is at Dallas, Texas.

The Railroad Commission of Texas is composed of the Honorables Lon A. Smith, its Chairman, C. V. Terrell and Ernest O. Thompson, members, each duly and legally elected as such, and each has heretofore duly qualified. The Railroad Commission of Texas is a department of State created under and by virtue of the Constitution and laws of Texas, and its said defendant members, each, respectively, has his official place of residence at Austin, in Travis County, Texas. Among other duties, the Railroad Commission of Texas is charged by law with the enforcement of the conservation laws of Texas, and to make, promulgate and enforce rules and regulations for the conservation of petroleum oil and gas, and for the spacing and drilling, operating and producing wells therefor, preventing waste. The defendants, O. C. Hammonds and his wife, Mamie S. Hammonds reside in Oklahoma County, Oklahoma.

II.

November 26, 1919, said Railroad Commission adopted and promulgated Rule 37, as follows:

"Rule 37. No well for oil or gas shall hereafter be drilled nearer than 300 feet to any other drilling or completed well on the same or adjoining tract or farm; and no well shall be drilled nearer than 150 feet to any property line; provided, that the Commission, in order to prevent waste or to protect vested rights, will grant exceptions Permitting drilling within shorter distances than as above prescribed, upon application filed fully stating the facts, notice thereof having first been given to all adjacent lessees affected thereby."

Said Rule was in full force and effect on the dates hereinafter alleged to and including February 28, 1931.

III.

By instrument dated July 31, 1930, recorded in Volume 4, page 1, of the Gregg County, Texas, records, the owners of the fee conveyed to J. A. Reynolds an oil and gas mining lease, among other lands, on the following described tract in Gregg County, Texas, to-wit:

"A part of the D. Sanchez H R survey, situated about 8 miles NW of Longview, Texas, Beginning at a stake in the South line of the Alexander survey, being the NW corner of a tract surveyed for J. B. Harley and now owned by Bob Smith;

Thence West, passing the SW corner of the M. Irwin survey at 731 vrs, on 751.4 vrs to a corner in the South line of the said Irwin survey;

Thence South 751.4 vrs to a stake on the West bank of a branch from which a Maple brs S 77 E. 7 vrs;

Thence E 751.4 vrs to a large Sweet Gum in a branch for corner;

Thence North 751.4 vrs to the place of beginning, and containing 100 acres of land, more or less."

By instrument dated September 15, 1930, recorded in Volume 60, page 115 of the Gregg County, Texas, records, the said J. A. Reynolds assigned said lease on the lands next above described to defendant, Mamie S. Hammonds, using the identical description and field notes as quoted next hereinabove.

On December 18, 1930, by an instrument recorded in Volume 67, page 47 of the Gregg County, Texas, records, defendants O. G. Hammonds and Mamie Hammonds, first describing said original lease as hereinabove quoted as to description and field notes, assigned the same to Claude Bell and R. A. Grady, as follows, to-wit:

"In so far as it covers the E Fifty (50) acres of the above described land."

On February 28, 1931, by instrument recorded in Volume 75, page 86 of the Gregg County, Texas, records, the defendants, O. O. Hammonds and Mamie S. Hammonds, first describing said lease as first hereinabove quoted as to description and field notes, assigned the same to plaintiff, as follows, to wit:

"In so far as it covers the West Fifty (50) acres of the above described tract of land."

IV.

On February 1, 1934, upon application of the defendant, Mamie S. Hammonds theretofore filed therefor, the defendant, Railroad Commission, entered its order in Rule 37, Case 10,856, on the Oil & Gas Docket of the Railroad Commission of Texas, granting to defendant, Mamie S. Hammonds, a permit to drill a well for oil and gas on a strip of land midway between the East and West lines of said 100 acre tract and extending from the North to the South lines thereof, being approximately 50 feet wide East and West by approximately 2100 feet long North and South, said well to be spaced on said strip 330' from the North line and midway between the East and West lines of said strip, defendants, Hammonds, claiming that, by actual measurement between its four corners, there is contained in said tract as originally leased as hereinbefore alleged, 102.81 acres of land, and that the 2.81 acre strip in the center of said tract lies West of the 50 acres first assigned by them to Bell and Graddy, and East of the 50 acres assigned by them to plaintiff, all as hereinbefore alleged, and that they are the owners of the leasehold estate in, on and to the same, and that same was not included in their assignment to Bell and Graddy nor in their assignment to this plaintiff.

This plaintiff would further show that said order of the defendant, Commission, was entered by the Commission without any sort of notice to the plaintiff, and without any sort of notice to any adjacent leaseholder to the North, East and South of said claimed strip, and without a hearing on said application.

Plaintiff would further show that Rule 37, as adopted, amended and promulgated by the defendant, Commission, and which was in full force and effect on February 1, 1934, is as follows, to-wit:

"Rule 37, adopted November 26, 1919, is hereby amended, in so far as it applies to the East Texas Field, so as to hereafter read as follows: no well shall hereafter be drilled for oil or gas at any point less than six hundred and sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than 330 feet from any property or division line; provided, however, the Commission, in order to prevent waste or to protect vested rights, will, after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby, provided, that if all adjacent lessees affected thereby waive in writing, notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing."

Plaintiff would further show that said order complained of herein was entered by the defendant, Commission, without notice and hearing, and that no adjacent lessee affected thereby waived in writing or otherwise, such notice and hearing, and no adjacent lessee affected thereby waived objections to the granting of such permit or application.

V.

Plaintiff brings this suit as an appeal from said order of the defendant, Commission, under Article 6049c, Revised Civil Statutes of Texas.

VI.

Plaintiff says that the order of the defendant, Commission, complained of is invalid for the reasons following, to-wit:

1. The land as originally leased by the fee owners on July 31, 1930, was rectangular in shape, was in one contiguous body, and was susceptible of development for oil and gas as a whole in strict conformity with said Rule 37, and with the conservation laws of the State of Texas, then in force, and neither the fee owners nor their lessee, nor any assignee of their lessee, had, or thereafter acquired any vested right to develop the same for oil and gas except in conformity with Rule 37, and the conservation laws of Texas.

2. That if said original 100 acre tract actually contains 102.81 acres, which is not admitted, but is expressly denied by the plaintiff, by their assignment of the East 50 acres of said tract to Bell and Graddy, as aforesaid, and by their assignment of the West 50 acres of said tract to the plaintiff, as aforesaid, the defendant, Hammonds, waived and divested themselves of all and every vested right to develop said land or any part thereof for oil and gas, because said claimed strip 50 feet East and West by 2100 feet North and South is not capable of development in conformity with Rule 37, or under any exception to said Rule, and with the conservation laws of Texas; that defendants, Hammonds, partitioned said land in view of Rule 37 and of the conservation laws of Texas, and are now estopped from drilling said strip for oil and gas, and from claiming any vested right to drill same for said purpose.

3. Because said order of the defendant, Commission, granting the defendants, Hammonds, a permit to drill said well on said strip, as aforesaid, was granted by said Commission without notice to this plaintiff, and without notice to any adjacent lessee affected thereby, and without a hearing, and without the introduction of any evidence, and without any adjacent lessee having waived objections

thereto, notice thereof, or hearing thereon in writing or otherwise.

4. Because said order is unreasonable, arbitrary, and discriminatory and should be annulled, in that said order permits the defendants, Hammonds, to drill a well for oil and gas on a 2.81 acre narrow strip of land 50 feet wide and 2100 feet long, and within 25 feet of plaintiff's East line; that if drilled, a location 50 feet to the East, and another 50 feet to the West of said location will be forced thereby, or three wells on a line 100 feet in length, which said wells, thus grouped, will cause a low pressure area when produced, and will cause great waste of oil and gas and of pool energy as will be hereinafter shown, all in violation of the letter and spirit of the conservation laws of Texas, and in direct contravention of Rule 37 of the defendant, Commission, and enables the defendants, Hammonds, to unfairly compete with this plaintiff in producing oil and gas from said leasehold estate, in that plaintiff is prohibited by said Rule 37 from drilling its land to a greater density than one well to each ten acres of land

VII.

Plaintiff says that it purchased the oil and gas mining lease on the West 50 acres of said original tract from the defendants, Hammonds, and that the defendants, Hammonds, sold said leasehold estate to this plaintiff, in view of the conservation laws of Texas, and in view of said Rule 37, then in force, and upon the implied and express agreement, representation and assurances, as expressed in said assignment, that the distances between the four corners of said original tract, each, respectively, was 751.4 varas, and that the courses from and to the beginning corner were due West, South, East and North, respectively, and that the West 50 acres of said original tract so assigned to plaintiff, was and would be contiguous to the

East 50 acres of said tract theretofore assigned to the said Bell and Graddy, and that the West line of said West 50 acres would be coincident with the West line of said original 100 acre tract, and with the implied assurance that the four lines of plaintiff's said estate thus assigned would never be offset by wells drilled upon said original tract closer to plaintiff's said property lines than 150 feet, and that plaintiff would never be required to drill a well, and that no well would be drilled, closer than 150 feet to the dividing line between the East and West 50 acres of said original 100 acre tract; that in reliance thereon, and in perfect good faith, plaintiff has developed its leasehold estate along its East boundary line in consonance with said Rule 37; that in September, 1931, defendant, Commission, amended its said Rule 37 so as to prohibit drilling wells for oil and gas in the East Texas Field at a closer distance than 330 feet from property lines and 660 feet from drilling or completed wells, and this plaintiff has developed its said leasehold estate along its East line in consonance with such amended Rule, spacing its well full 330 feet West from its East line at a cost of approximately $15,000.00 for each well so drilled, and in full reliance upon said implied agreement and assurance of the said defendants, Hammonds; that if the defendants, Hammonds, shall be permitted to drill said claimed strip of land for oil and gas, plaintiff will be required to offset each said well so drilled by an equidistant West offset, unnecessary to a proper development of plaintiff's leasehold estate but for such drilling by defendants, Hammonds, to its great and irreparable injury. Each such offset well will cost approximately $15,000.00 and defendants, Hammonds, being non-residents of the State, a moneyed judgment cannot be had against them or either of them because no personal service can be had upon them in Texas, and plaintiff has no remedy in law; that plaintiff cannot obviate the injury to it by drilling such offset wells in that the wells now drilled on plaintiff's said lease are adequate to drain all of

the recoverable oil in and under such area, and by grouping wells along said narrow strip will augment the injuries to plaintiff as will be hereinafter alleged, and will occasion great waste of oil and pool energy as will be shown, and that its right to offset such wells is not an adequate remedy, and plaintiff has no adequate remedy in law.

VIII.

Plaintiff says that by reason of the facts alleged, defendants, Hammonds, are estopped from drilling said strip of land; that the wells now on said 100 acre tract are sufficient to drain all of the oil and gas from and under said tract in the area where defendants, Hammonds, seek to drill, and that the location complained of is not forced; that if said strip of land actually exists on the ground as additional to the East and West 50 acres of said original tract, and if the same was not, as a matter of fact and law, included in said assignments to Bell & Graddy and to plaintiff, this plaintiff here now offers to pay the defendants, Hammonds, the same per acre consideration for said 2.81 acre strip as was paid by plaintiff to the defendants, Hammonds, for the West 50 acres of said original tract, and here now proposes and offers in good faith to do full equity to the defendants, Hammonds, to the end that the injuries to plaintiff here complained of may be obviated, and its property and the State's natural resource be conserved.

IX.

Plaintiff says that the said original tract of land, including the strip of land here involved, are located in what is designated by the defendant, Commission, as the East Texas Field; that the entire original tract is underlaid with a woodbine sand which is saturated with oil and

gas, and which constitutes a common oil pool; that the lifting force which forces the oil through said sands, into and through wells drilled therein is hydrostatic pressure vertically and from the Westward on the western edge of said pool; that the lands here involved are over the Eastern portion of said pool; that if said well is permitted to be drilled by the defendant, Hammonds, an equidistant offset well will be forced to the east and west thereof, thus forcing the drilling of three wells along a line 100 feet in length, and when produced will occasion a low pressure area at such point, to equalize the pressure in and about such area, oil will be forced toward such point from surrounding high pressure areas at a great sacrifice and loss of energy. With lowering of pressures gas wastage will start, which when exhausted or diminished increases the viscosity of the crude, thus leaving great quantities of oil in place in such structure; that one well at such location is amply sufficient to drain fifteen acres of recoverable oil, and to drain all of the recoverable oil in and under fifteen acres of land; that the three wells located as herein alleged will eventually exhaust great and inestimable quantities of energy from, in and under plaintiff's leasehold estate, and from the lands lying East thereof, and will leave great and inestimable quantities of oil in place thereunder, which can never thereafter be recovered, to the great and inestimable loss and injury to plaintiff and to the State, and plaintiff has no remedy at law to prevent it.

X.

Plaintiff says that the injuries herein alleged and complained of cannot be prevented by drilling an equidistant offset to defendants, Hammonds', said location because one well is sufficient, in said area, to drain all of the recoverable oil from and under fifteen acres of land; that an equidistant offset well on plaintiff's land West from said

location cannot prevent the defendants, Hammonds', complained of well located as it is proposed and permitted, 25 feet East from Plaintiff's East line, from draining a great and inestimable quantity of oil and gas from plaintiff's said land, title to which was acquired, as aforesaid, from the defendants, Hammonds, for a valuable consideration, and the defendants, Hammonds, warranted title to the same by general warranty in writing; that because of the migratory nature of oil passing from high to low pressure structure, it is impossible to know or to approximate with reasonable certainty the amount of oil in barrels that will be drawn from plaintiff's leasehold estate, but the plaintiff says that it will be great and inestimable, and that plaintiff has no remedy in law to prevent it; that this plaintiff here now pleads such general warranty of the defendants, Hammonds, as expressed in their assignment of said leasehold estate to this plaintiff in estoppel of their claim or right to drill said narrow strip; that by reason of all of the facts hereinbefore alleged the action of the defendants, Hammonds, in drilling and in attempting to drill said well, and in developing and attempting to develop said long narrow strip of land for oil and gas, is a fraud upon this plaintiff, which should be restrained in equity, plaintiff being without remedy in law as hereinbefore alleged; that by drilling an equidistant West offset to said complained of location, plaintiff will but augment the injuries complained of, in that the group of wells drilled at such close proximity one to the other will produce a low pressure area as hereinbefore alleged, which, for the reasons alleged, will efentuate great waste of petroleum oil that would otherwise be recovered by the plaintiff and the lessees to the East and North, because of the exhaustion of pool energy as aforesaid quantities of oil will be left in place with no propelling and lifting force to remove it, and can never thereafter be recovered, to the great and inestimable injury and damage to this plaintiff. Upon discovery that the defendant, Commission, had

granted said complained of permit, plaintiff immediately thereupn filed its motion for rehearing in said cause before said Commission, but that said motion was, in all things, overruled. Plaintiff having exhausted its remedy without avail is without remedy in law to prevent the injuries complained of.

Wherefore, plaintiff prays that a temporary restraining order issue herein restraining the defendants, O. O. Hammonds and Mamie S. Hammonds, their agents, servants, employees, contractors and legal representatives from drilling and from attempting to drill and from permitting the drilling of such well on said strip of land, no well having been begun at said location to this date; that this cause be set for hearing by the Court on a day certain, and that the defendants be notified thereof and cited in terms of law to appear and show cause why temporary injunction should not issue, and that on such hearing, temporary injunction issue so restraining and enjoining the defendants, Hammonds, their agents, servants, employees, contractors and legal representatives; that the defendants and each of them be cited in terms of law to appear and answer herein, and that upon trial hereof, plaintiff have judgment decreeing said 2.81 acre strip to be a part and parcel of plaintiff's leasehold estate as assigned to it, and in any event, that the complained of order of the defendant, Railroad Commission, be in all things annulled, canceled and held to be invalid and of no force and effect, and that the temporary injunction be made permanent against the defendants, Hammonds, their agents, servants, employees, contractors and legal representatives; that if it shall be determined that said 2.81 acre strip exists and that same was not included in the assignment to plaintiff of the leasehold estate in, on and to the West 50 acres of said original tract, and then and in that event, that defendants, Hammonds, be required to accept from plaintiff the same per acre consideration therefor as was paid and acccepted

for the said West 50 acres of said original tract, the plaintiff, in any event, being ready, willing, and hereby proposing to do full equity to and by the defendants, Hammonds, and that all title and claim of the defendants, Hammonds, in and to said 2.81 acre strip be divested out of them and each of them and that title in and to the leasehold estate in, on and to the same be vested in this plaintiff, for all costs of suit, and for full relief in law and equity.

SUN OIL COMPANY,
By. T. L. FOSTER,
J. W. TIMMINS,
BEN H. POWELL,
J. A. RAUHUT,
E. R. PEDIGO,
Plaintiff's attorneys.

The State of Texas,
County of Travis.

Before me, the undersigned authority in and for said State and County, on this day personally appeared E. R. Pedigo, an attorney for the plaintiff, who, being first by me duly sworn, on his oath says that he is an attorney for the plaintiff, Sun Oil Company; that he is authorized and empowered to make this affidavit; that he has read the within and foregoing petition, and that the allegations of fact therein contained are true.

(Signed) E. R. PEDIGO.

Sworn to and subscribed before me this the 30th day of May, A. D. 1934.

(Signed) R. W. TOBIN,
(Seal) Notary Public, Travis County, Texas.

At Chambers May 30, 1934.

The within and foregoing petition having been presented to and heard by the judge of the District Court in and for

the Fifty Third (53rd) Judicial District of Texas, in and for Travis County, Texas, at chambers, this 30th day of May, A. D. 1934, and it appearing to him from the facts stated therein that the applicant is entitled to a temporary restraining order, that the same is within complainant's allegations and prayer, that the allegations of fact contained in said petition are duly verified by one qualified and authorized thereto, that delay will not injure either party and that justice may be subserved thereby, it is ordered that the clerk of this Court issue a temporary restraining order, operative until and pending the hearing below ordered, restraining the defendants, O. O. Hammonds and Mamie S. Hammonds, their agents, servants, employees, contractors and legal representatives, and the agents, servants, employees, contractors, and legal representatives of each said defendant, from drilling, attempting to drill and from permitting to be drilled, a well for oil and gas on the strip of land consisting of approximately 2.81 acres fully described in complainant's pleading, upon the complainant executing in behalf of the defendants a bond in the sum of $1000.00, conditioned as the law requires. The clerk shall quote this fiat and embody such order in a writ, which will also require the defendants to appear in the Court room of the Fifty Third (53rd) District Court of Travis County, Texas, on the 2nd day of July, 1934, to show cause why temporary injunction should not be granted upon such petition effective until final decree in such suit. Such writ shall be served by the sheriff, or any constable.

(Signed) C. A. WHEELER,
Judge 53rd District Court
Travis County.

Indorsed: No. 53,915—Sun Oil Company vs. Railroad Commission of Texas, et al—53rd District Court, Travis County, Texas—For Injunction—Plaintiff's Original Petition—Filed in the 53rd District Court of Travis County,

Texas, May 30, 1934, Geo. H. Templin, District Clerk, by Geo. W. Bickler, Deputy.

The State of Texas,
County of Travis.

I, Geo. H. Templin, Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Plaintiff's Original Petition In Cause No. 53,915, wherein Sun Oil Company is Plaintiff and Railroad Commission of Texas, et al are Defendants, as the same appears on file in this office.

Given under my hand and seal of office, at Austin, Texas, this the 4th day of Feb., 1941.

GEO. H. TEMPLIN,
(Seal) Clerk, District Courts, Travis County, Texas.
By .....,
Deputy.

Mr. Rauhut:

To identify the location involved in that suit, we will offer a copy of the order of the Railroad Commission granting the permit that is involved in that suit, for the information of the Court.

Mr. Cale:

We have no objection.

(Thereupon the Order referred to above was marked for identification as Plaintiff's Exhibit No. 15,—same being here set out as follows):

218 PLAINTIFF'S EXHIBIT No. 15.

State of Texas

Railroad Commission of Texas
Austin

Case No. 10,856

Rule 37

#1 W. L. Fuller 2.81 ac Sanches Sur., Gregg Co.

Applicant: Mrs. Mamie S. Hammonds, 623 East 18th St., Oklahoma City, Okla.

Austin, Texas, Feb. 1, 1934.

The application of Mrs. Mamie S. Hammonds for an exception under the provisions of Rule 37 coming on to be heard on this the first day of February, 1934, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception, and that same should be granted for the protection of vested rights:

Now, Therefore, It Is Ordered that the application of Mrs. Mamie S. Hammonds for an exception under the provisions of Rule 37, and a permit to drill her well #1 W. L. Fuller 2.81 ac D. Sanches Survey, Gregg County, Texas, is hereby approved and the applicant is granted permission to drill her well #1; as shown on plat submitted:

330 feet south of the north line and midway between the east and west lines of said tract.

It is expressly provided and made a part of this order that no other well will ever be drilled on this tract.

It is further provided that if there is a building, structure or other object of any kind which would constitute a fire hazard less than 150 feet to location described herein same must be removed from the premises before the well covered by this permit is drilled into any pay formation.

The above and foregoing is a true and correct copy of an order of the Commission entered on this the 1st day of February, 1934.

R. D. PARKER,
Chief Supervisor.

Mr. Rauhut:

Here is the final judgment entered in that case on November 29, 1939.

(Thereupon the Judgment referred to above was marked for identification as Plaintiff's Exhibit No. 16,--same being here set out as follows):

219 PLAINTIFF'S EXHIBIT No. 16.

In the 53rd District Court of Travis County, November 29, 1939.

53,915 Sun Oil Company, Et Al vs. Railroad Commission, Et Al.

On this 29th day of November 1939, pursuant to regular setting and at a regular term of Court came on to be heard the above numbered and entitled cause, and came Plaintiff Sun Oil Company, Intervener Magnolia Petroleum Company, Defendants Railroad Commission of

Texas and the members thereof, and Defendants Mamie S. Hammonds, O. O. Hammonds and Intervener T. S. Schroeder, all by their respective attorneys of record, and announced ready for trial The Court having heretofore overruled the demurrers and exceptions contained in the respective pleadings of all parties by order entered herein on July 19, 1934, and a jury being waived, the Court proceeded to hear the evidence and argument of counsel, and it being shown by undisputed evidence that the order of the Railroad Commission granting permit herein complained of was entered without notice and the holding of a hearing as required by law, the Court finds Plaintiff Sun Oil Company and Intervener Magnolia Petroleum Company are entitled to judgment as a matter of law, and that it is not necessary for the Court to determine any other issue in this case.

It Is Therefore Ordered, Adjudged And Decreed that Plaintiff Sun Oil Company and Intervener Magnolia Petroleum Company be and they are each hereby awarded judgment annulling that certain order entered by the Railroad Commission of Texas in Rule 37 Case No. 10856 on its Oil and Gas Docket, dated February 1, 1934, granting Mamie S. Hammonds permit to drill and operate well No. 1 at a location 330 feet south of the North line and midway between the East and West lines of a parcel of land described in said order as 2.81 acres, being a part of the W. L. Fuller fee tract of 100 acres, more or less, situated in the Dolores Sanches Survey, Gregg County, Texas, more fully described in Volume 4, page 1, of the Deed Records of Gregg County, Texas, to which reference is here made for further description, said 2.81 acres of land being located between Sun Oil Company's lease on the west 50 acres of said Fuller tract and Magnolia Petroleum Company's lease on the east 50 acres of said Fuller tract; and said order of the railroad Commission of Texas is hereby canceled, set aside and decreed wholly null and void.

It Is Further Ordered, Adjudged And Decreed that Defendants Mamie S. Hammonds, O. C. Hammonds and Intervener T. S. Schroeder, and each of them, their agents, servants, employees, contractors and legal representatives, be and they are perpetually enjoined from drilling or attempting to drill a well for oil and gas under the permit order herein annulled, and from producing or attempting to produce oil and gas from such well.

It Is Further Ordered, Adjudged And Decreed That this judgment be and it is hereby entered without prejudice to the right of any of the parties herein mentioned to apply to the Railroad Commission of Texas for other permits to drill oil and gas wells at such places on the tract of land above mentioned as they may desire.

All costs herein are taxed against the Defendants and Intervener T. S. Schroeder, for which execution may issue.

RALPH W. YARBOROUGH,
Judge Presiding.

O. K. as to form:
F. L. KUYKENDALL,
FRED P. BRONSON,
JULIUS H. RUNGE,
Atty. for T. S. Schroeder.
DAN MOODY,
Atty. for Magnolia.
JAMES P. HART,
Assistant Attorney General.

(Indorsed): No. 53,915. Sun Oil Company, et al. vs. Railroad Commission, et al. In the 53rd District Court of Travis County, Texas. Final Judgment. Filed in the 53 District Court of Travis County, Texas, Nov. 29, 1939.

Geo. H. Templin, District Clerk. By Jas. T. Johnson, Deputy.

The State of Texas,
County of Travis.

I, Geo. H. Templin, Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Final Judgment in Cause No. 53,915 wherein Sun Oil Company, et al, are Plaintiffs and Railroad Commission, et al, are Defendants as the same appears on file and of record in this office; in Minute Book 72, Page 304.

Given under my hand and seal of office, at Austin, Texas, this the 4th day of February, A. D. 1941.

(Signed) GEO. H. TEMPLIN,
(Seal) Clerk of the District Courts of
Travis Co., Texas,
By ....., Deputy.

The Court:
Anything further, counsel?

Mr. Rauhut:
I believe we are just about through with the record evidence here.

The Court:
Well, I will recess now until two o'clock.

(Thereupon, at 11:55 o'clock a. m. a recess was taken until 2:00 o'clock p. m. of the same day.)

Wednesday, February 5, 1941.

Afternoon Session.

Mr. Rauhut:

During the noon recess we dictated another stipulation that we would like to have read to the Court by the reporter.

(Thereupon the reporter read the following stipulation, which is herewith made a part of this record.)

224 STIPULATION.

It is stipulated by all parties that Mamie S. Hammonds and husband, O. O. Hammonds, assigned the oil and gas lease on the strip involved in the Burford Application, to T. S. Schroeder on May 18, 1934, and that T. S. Schroeder in turn assigned the lease on what we refer to as the strip of 2.33 acres to G. E. Burford on February 21, 1938, and that G. E. Burford in turn executed an assignment of the lease on the strip to X. Y. Z. Oil and Gas Company on April 3, 1939, which assignment was filed for record in Gregg County Deed Records on April 22, 1939.

It is further agreed that G. E. Burford is president of X. Y. Z. Oil & Gas Company, not only at this time but also was during the entire year of 1939.

Mr. Rauhut:

We would like to call as our first witness, Major J. D. Copeland, Jr.

225 J. D. COPELAND, JR., called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Rauhut:

Q. Will you state your name?

A. J. D. Copeland, Jr.

Q. Are you connected with the State Government at this time in any official capacity?

A. No, sir.

Q. Are you connected with the National Guard of the State of Texas?

A. It used to be the National Guard. It is now the Army of The United States.

Q. What is your position in that?

The Court:

What is the materiality of that?

Mr. Rauhut:

Merely to acquaint the Court with the veracity of this witness.

A. Major in the Quartermaster Corps.

Q. Have you ever been employed by the Railroad Commission of Texas?

A. Yes, sir.

Q. In what capacity were you last employed by the Railroad Commission of Texas?

A. Examiner in the Oil and Gas Division.

Q. Did you conduct hearings in that capacity?

A. Yes, sir.

Q. On applications for permits to drill wells in exception to Rule 37 in the East Texas Field?

A. Yes, sir.

Q. In that capacity did you conduct hearings on the application of G. E. Burford for a permit to drill wells 1 to 4 on the W. E. Fuller 2.33-acre tract in the Sanchez survey in Gregg County, Texas?

A. Yes, sir.

Q. Do you recognize this file I hand you here?

A. Yes, sir.

Q. Is that the Commission's file on the G. E. Burford application to drill wells 1 to 4 on the W. E. Fuller Railroad Commission case No. 26868? The papers in there bear the official file marks of the Oil and Gas Division?

Mr. Cale:

There were several of those applications. I cannot be certain what he is talking about unless he refers to the date, because, there were three in all.

Mr. Rauhut:

I borrowed this file from the Attorney General. All three applications are in the same file and all the orders of the Commission with respect to it.

The Court:

Let's see what the witness will say about it.

A. What is the question?

Q. Is that the Commission's files?

The Court:

Do you contemplate putting that whole file in evidence?

Mr. Rauhut:

No, sir. I have already introduced a great many of the instruments, and I do not contemplate putting them all in.

The Court:
Well, what is the use of asking him about the whole file?

Mr. Rauhut:
Because it will tie in with questicns I will ask him with reference to the manner in which the Railroad Commission passed on this case.

The Court:
Why don't you come to your point?

Mr. Rauhut:
All right, Your Honor.

Q. I will also hand you here three papers,—the transcripts of hearings. Do you recognize those papers—those transcripts.

The Court:
The Court has not time to sit here while he deliberates whether he knows or not. Show them to the witness. Have you done anything about those?
A. Yes, sir; if I have a chance to check to see what I think they are.

The Court:
You don't have to check each one, do you?
A. I believe I would.

Q. Are they transcripts of hearings on the three hearings on the Burford applications for permits to drill wells 1 to 4 on the Fuller tract?
A. They are apparently copies.
Q. They are certified, and each signed by the official reporter.

A. That is what I could not find—yes, they are; they are certified at the back.

Q. What are the date of the three hearings held on the Burford applications?

A. One hearing held on August 15, 1938; a hearing held on January 31, 1939; a hearing held May 19, 1939.

Q. Did you conduct each of those hearings as the Examiner?

A. I conducted two of them, I believe; and partly conducted the third one.

Q. What do you mean, partly conducted that third one?

A. I mean there were two examiners sitting in on one of the hearings.

Q. Which one was that?

A. It was the hearing of January 31, 1939.

Q. Now, was any member of the Railroad Commission of Texas present at any one of those hearings?

A. No, sir.

Q. Did you have a reporter of the Oil and Gas Division there to report the hearings—to make a stenographic report of the hearings?

A. Yes, sir.

Q. Who is that lady?

A. Mrs. Louise Kirk.

Q. Will you state what procedure was employed after you had conducted the hearing, and after you conducted these hearings, in presenting the matter to the Railroad Commission of Texas for decision?

A. After the hearing is concluded, it and other hearings that were held that day, a memorandum was made to each application.

Q. By the examiner?

A. By the examiner; and then at some later date, it with others was taken before the Commission in conference for their decisions.

A. You say "it with others." You mean the files of the Commission on various pending hearings?

A. I mean "it" in the sense you take any one.

Q. The file on any one application?

A. That is right.

Q. You would take the file into them and not merely the memorandum?

A. That is correct.

Q. Now, would you take these in one at a time or a great number of these pending files?

A. There would be several.

Q. What did you do when you took them in to the Commission, and how were they handled by the Railroad Commission? Was there a conference with the Railroad Commission, or what was the procedure?

Mr. Kuykendall:

We believe the witness should confine his remarks to this particular application, and not to any others not involved in this case.

The Court:

I assume this one is covered.

A. The file which is contained in the jacket contains all the papers pertaining to the case, with the memorandum by the examiner, and was laid before the Commission with the plat open for the Commission to look at.

Q. Were the transcripts of testimony—were the stenographic notes of the hearing transcribed at the time of the conference that was held on these Burford applications?

Mr. Cale:

The witness has not testified he knew when the conference was held.

Q. Were you present when the Burford application was presented to the Commission in conference?

A. I believe that I was.

Q. Was it the custom for the man who made the memorandum to take the file in to the Commission and discuss it with them?

A. Yes, sir.

Q. Did you make a memorandum on the Burford application on each of these three hearings?

A. I believe that I did.

Q. Now, have you checked those transcripts to see whether the testimony that was adduced at the hearings, say the second hearing and the third hearing, were transcribed at the time the Commission entered its orders disposing of the application or at the time of the conference.

Mr. Hart:

I think he is asking him to testify from hearsay, and we object to it on that ground. He apparently wants him to look at a certificate and testify from that.

Mr. Rauhut:

I will change the question.

Q. Did you attend the conference with the Railroad Commission on the Burford application on the occasion when they granted him a permit to drill four wells?

A. That was on the hearing of May 19?

Q. Yes, sir.

A. I was present.

Q. And did you have with you to present to the Commission anything besides the files? Did you have with you the transcript of the testimony that was adduced at the hearing on May 19, 1939?

A. The transcript of the hearing of May 19, 1939, I don't believe was with the file when the Commission acted on it.

Q. The date of the certificate in the transcript is what date?

A. June 9, 1939.

Q. What was the date of the Commission's order granting the oil permits?

A. My recollection is June 2. Let me see.

Q. Check it, please, sir.

A. June 2, 1939.

Q. Does that in any way confirm your statement that the transcript was not there at the time of the conference?

A. I don't believe it could be at the conference because it was not written until afterwards.

Q. Now, at the conference what was the practice of the Commissioners as to how they indicated approval or disapproval?

A. They initialed the memorandum either granting or denying.

Q. Does that file show which Commissioners initialed the memorandum, or whether they did initial the memorandum in this case?

A. It would. Yes, sir; there are two initials granting it.

Q. Which ones?

A. Smith and Sadler.

Q. Is that your memorandum of the May 19, 1939, hearing?

A. Yes, sir.

Mr. Rauhut:

We offer this in evidence.

(Thereupon the memorandum referred to was marked for identification as Plaintiff's Exhibit No. 17, same being herewith set out as follows:)

232 PLAINTIFF'S EXHIBIT No. 17.

Case No. 26,868. Case No. .....

Applicant:
G. E. Burford, 4436 Fairfax Ave., Dallas, Texas.

Protestant:
Sun Oil Co.,
Atlantic Refining Co.,
Standard Oil Co. of Kansas & J. G. Beard.

Well Description:
1, 2, 3, 4 W. L. Fuller 2.33 ac. D. Sanchez Survey, Gregg Co.

Attorney for Applicant:
Gordon Griffin.

Attorney for Protestant:
Martin Row,
J. A. Rauhut,
A. S. Rhea,
J. W. Stayton, by letter.

Application filed: .....

Notice issued: May 6, 1939.

Date of Hearing: May 19, 1939.

Examiner's Memorandum.

June 1, 1939.

This lease is located in the East Texas field where the spacing rule is 330 feet from lease lines and 660 feet between wells.

The Commission in Case 26,868 on March 25, 1939, granted G. E. Burford permission to drill well No. 2 on this lease and denied the application for wells Nos. 1, 3, and 4. On the 29th day of April, 1939, the Commission granted applicant's motion for rehearing on wells Nos. 1, 3, and 4 and also granted protestants' motion for rehearing on well No. 2. Both hearings were held on May 19th, at which time the Examiner limited both parties to the requests granted by the Commission. All the information in the prior files should be considered.

Applicant reintroduced his testimony given at the prior hearing which shows the various areas of his lease which according to his contention are not being adequately drained by wells on his tract or on the adjacent tracts at this time. This tract is a subdivision of a 100 acre tract and it was shown that the entire 100 acre tract is entitled to additional wells. Therefore the applicant contended that under the Century case, since a part of his tract was within the area not being adequately drained the wells could be spaced on his portion.

Protestants at the rehearing put on a witness who testified in regard to drainage of the entire tract and testified that this would make close spacing of wells and thereby create a low pressure area and thereby create waste. On cross examination by the Examiner, it was brought out that the same spacing is already in effect on the leases on each side of this tract and that this would not decrease the distances between wells but would bring about a more uniform spacing of the entire 100 acres. The Sun Oil Company did not submit their witness to cross examination by the applicant for the reason that applicant offered no witnesses at the rehearing. Protestants contended that the wells could be spaced on the main body of the 100 acres; however, there are now no applications pending at this time except the Magnolia's application for a direct offset to this No. 2 well.

Thus the Commission has at this time pending before it the disposition of all four wells as originally asked for by the applicant Burford. The spacing desired is:

No. 1—330 feet S. of N. Line; Midway between E. & W. Lines;

No. 2—489 feet S. of location #1; midway between E. & W. Lines;

No. 3—489 feet S. of location #2; midway between E. & W. Lines;

No. 4—330 feet N. of S. Line; midway between E. & W. Lines.

Respectfully submitted,

(Signed) J. D. COPELAND, JR.,
(J. D. Copeland, Jr.),
Examiner.

jdc: lk.

Application:
Granted S. 6-25 H.
Denied .....

Q Were these memoranda initialed in the conference while you were there?

A Yes, sir.

Q How long did those conferences require as to a particular application? How much time did the Railroad Commission spend in considering these files?

Mr. Cale:

This witness is not qualified to tell how much time the conference took. He can tell how long he was there.

Mr. Rauhut:
Ail right.

Q. Mr. Copeland, you have already stated that you took the file in to the Commission for the conference. When you got through with them did you take the files out?

A. That was the custom, yes, sir.

Q. And returned them to your office?

A. Not to my office, but to the files.

Q. At the time you would be taking them back from the conference there was no signed order, but merely initials on the memorandum indicating what kind of order they wish drawn?

A. That is correct.

Q. The order would be prepared later and sent back to them for their signature?

A. Yes, sir.

The Court:
Can't you get this without so much circumlocution? After you held these hearings you took these papers in there and talked to the Commission about it, and made them your recommendation, and they either accepted it or rejected it. Is that what happened?

A. No, sir; that is not what happened.

The Court:
Then tell what did happen.

A. You are correct in everything except that the Examiner did not make a recommendation for or against any permit. They merely held a hearing and made a brief synopsis of the hearing in a memorandum, neither recommending it be granted or recommending it be denied. We did that prior to 1935. Since that time, they did not allow us to recommend.

The Court:

How did they arrive at their decision?

A. They based their decisions on the maps and their knowledge of the field, and any papers that might be within the files.

The Court:

All right. Anything else?

Mr. Rauhut:

A. Yes, sir.

Q. You remained there until the end of the conference and took the file with you?

A. That is my recollection.

Q. Did the reporter come in and read the testimony from her notes during the conference?

A. On this particular case?

Q. Yes, sir.

A. Not to my knowledge.

Q. How long did the conference last? How long would you estimate it lasted with reference to this application?

A. That would be rather hard to say, but the conference lasted some two or three hours. With all the other applications you could not definitely say now how long each took.

Q. Can you say approximately how long they usually spend on an application? Give us a safe estimate of what it would be.

A. Ten to thirty or forty minutes.

Mr. Cale:

We object to that.

The Court:

Objection is overruled

Q. Ten to thirty or forty minutes is your answer?

A. Yes, sir.

Q. Now, the memorandum that the Commission required the Examiner to make, and that you made in reference to the Burford hearing, was that a public document open to inspection of everybody prior to the time the Commission made its decision?

A. The Commission made an order that it was not to be.

Q. In other words, that was kept private until the Commission had acted?

A. It was kept in the files and no one was privileged to read it except members of the Commission.

Q. Members of the Commission and its employees?

A. Yes, sir.

Q. Then it was not submitted to the attorneys for the interested parties in the hearings for suggestions, revision or criticism by them?

A. Not to my knowledge.

Q. You did not submit your memorandum on this Burford application to anybody for their approval, or correction, or suggestion?

A. None other than the Commissioners.

Q. Did you undertake to state all the evidence in your memorandum?

A. I did not.

Q. With reference to objections to testimony, and the admission or exclusion of testimony at the hearings, did you have any procedure at those hearings for the preparation of Bills of Exception to present the objections to the Commission for their ruling?

A. No, sir.

Q. And when objections were made, they were merely noted in the transcript of the evidence there?

A. That is correct.

Q. And did not appear in your memorandum?

A. No, sir.

Q. The Commission would not know what the objections were then without reading the transcript, is that the situation?

A. I don't think they would.

Q. Was there any practice on the part of the Commission, or did it in this case, do any such thing as to make and file written findings of fact as to their reasons for granting a particular permit?

A. I have seen none.

Q. They had no such factors other than what they decided in their order granting the permit?

A. That is all I have seen.

Mr. Rauhut:

That is all.

Cross Examination.

Questions by Mr. Cale:

Q. Major Copeland, refer to your files with reference to the first application that was made on these, with reference to wells Nos. 1, 2, 3, and 4 on the W. L. Fuller and G. E. Burford 2.33-acre tract. I want to know if you construe that first application was filed June 18, 1938, and if not, what date?

A. I have an application apparently filed June 18, 1938.

Q. I will ask you to consult the transcript that you have there, if you do have one, and what date is the date of the first transcript with reference to the application filed on June 18, 1938.

A. You mean the date the transcript was prepared?

Q. Yes, sir.

A. Apparently it was prepared on April 22, 1939.

Q. What was the date, if it indicates on the front, that the hearing was held?

A. August 15, 1938.

Q. Will you look in there and see if the files show or indicates the date the order was entered on that application? You said you held a hearing. Now, what date was the order entered?

Mr. Rauhut:

It has been agreed that the order was entered on September 21, 1938.

Mr. Cale:

All right.

Q. The second application was filed January 9, 1939, upon wells 1, 2, 3, and 4, wasn't it?

A. Yes, sir.

Q. Now, the hearing was held January 31, 1939, was it not?

A. There was a hearing held on that date on that application, yes, sir.

Q. That record was transcribed on the 21st of April, 1939, wasn't it, according to the record?

A. April 21, 1939, yes, sir.

Q. Now, the last hearing that was held was held on the 19th of May, 1939,—the last one you helped conduct.

A. That is right.

Q. That record was transcribed on June 9, 1939, isn't that true?

A. Yes, sir; that is what it says.

Q. Now, you have three records there in your possession—that is transcripts of evidence. One was transcribed on April 21, 1939, and when did you say the first one was transcribed,—the hearing of August, 1938?

A. April 22, 1939.

Q. Now, do you know of your own knowledge, whether or not those two transcripts were in the files with the other papers when you presented them to the Railroad Commission for their deliberations in the May hearing of 1939?

A. My recollection both were within the files.

Mr. Rauhut:

That is, the two prior hearings—the transcripts of the two prior hearings?

Mr. Cale:

Yes.

Q. I believe you have testified that you had your recommendation or your memorandum to the Commission of the last hearing at the time they acted in the file?

A. The memorandum—not a recommendation.

Q. The examiner's memorandum?

A. Yes, sir.

Q. What was your purpose of being in that conference? Did you advise or make recommendations or even discuss these matters with the Commission?

A. Yes, sir; not in the form of advice; only to answer questions they might ask pertaining to any individual case.

Q. Relative to the testimony and to the physical facts pertaining to the tract; is that true?

A. Yes, sir; that is true.

Q. You testified a while ago that you had not included all the testimony in your memorandum. I will ask you this question: In preparing your memoranda to the commission and particularly the memorandum with reference to the last hearing, did you keep anything out of your memorandum that you considered relevant or material?

A. That would probably be a matter of just my opinion.

Q. That is what I am asking you for.

A. Not intentionally.

Q. Since that time have you found out that you did leave out anything that was relevant or material in the Examiner's memoranda.

Mr. Rauhut:

That is asking him now what is relevant and what is not. That would be a conclusion I think.

The Court:

The objection is sustained.

Q. Now, Major Copeland, you did have an oral discussion with the Railroad Commission with reference to these permits?

A. Yes, sir.

Q. You did discuss them one way or the other with them—about how many permits should be granted, of what had been testified to at the hearing?

A. I did discuss with them actions at the hearing; but not in the form of a recommendation as to any permit whether it should be granted or denied.

Q. When was the last order relevant to the granting of permits 1, 2, 3, and 4, on the 2.33-acre tract entered, Major Copeland?

A. You are not talking about the re-hearing?

Q. Yes; I am talking about the re-hearing.

A. The last thing I have a recollection of is an order entered by the Railroad Commission on July 10, 1939, which is an order denying a motion for re-hearing filed by the Sun Oil Company and the Magnolia Petroleum Company.

Q. Had all the records of the three hearings been transcribed as to that date—before that date; do your records reflect that they had?

A. Yes, sir; they show all the transcripts were prepared prior to July 10.

Mr. Cale:

That is all.

Re-Direct Examination.

Questions by Mr. Rauhut:

Q. That order of July 10, 1939, was overruling a motion for re-hearing filed by the Sun and Magnolia?

A. Yes, sir.

Q. At the time the permit was granted for the four wells on June 2, 1939, the transcript of the last hearing had not been made?

A. That is correct.

Q. And you did not undertake to tell them from memory each and every statement and bit of testimony that the witnesses offered at the hearings; you would not undertake to do that?

A. No, sir.

Mr. Rauhut:

That is all.

Mr. Cale:

That is all.

(Witness excused.)

Mr. Rauhut:

I want to show Your Honor now that this memorandum is not a sufficient statement of the evidence adduced, and I am going to offer the transcripts themselves for that purpose.

The Court:

Read the memorandum.

(Thereupon counsel read Plaintiff's Exhibit No. 17 to the Court.)

The Court:

Those are matters I have no control over. Suppose the Commission has made a mistake about it. Can I substitute my judgment for theirs?

Mr. Rauhut:

No, sir; but you can certainly hold it is the duty of this administrative body to decide in accordance with the facts, and if they do not have the testimony before them, how can they purport to act?

The Court:

Doesn't it boil itself down to a proposition of whether they have to sit there and hear the matter themselves, or if they can send these men out to hold these hearings?

Mr. Rauhut:

I will concede that they can have an examiner hold a hearing; but they have got to read this testimony and know what it is and find the facts; otherwise, they have denied us due process of law and denied us a full and fair hearing, when they do not know what the evidence is.

The Court:

It is a pretty hard proposition to say whether they knew the facts or not. The only thing I take exception to is that you are going into minute detail into a lot of things that will not help us when we get through. When we get through the question will be boiled down to whether the Commission really gave you a hearing or not.

Mr. Rauhut:

I was merely attempting to show that the memorandum was not a sufficient statement of the evidence adduced, because the memorandum contains incorrect statements; it does not state all the evidence, and it incorrectly states

some of the evidence; it does not state objections to the inclusion of testimony; and it incorrectly states why the Sun Oil Company refused to submit to cross examination at the hearing.

The Court:

In other words, you say you did not get a fair hearing?

Mr. Rauhut:

That is exactly it; and the hearing that was held, the Commission paid no attention to it whatever, and they did not know what took place and could not know.

The Court:

All right.

Mr. Rauhut:

Now, first, for the limited purpose of showing that this Examiner's memorandum does not state these adequately and properly to the Commission and was not sufficient in itself to excuse the reading of these transcripts, I want to offer the transcripts of these three hearings. Secondly, we offer them for the limited purpose of showing what evidence was received there, and with the objections and exceptions that were made, and the insufficiency of the evidence the Commission had before it on another attack on the validity of these permits. They are offered for those limited purposes.

The Court:

You can put them in, but I am not going to let you read them to me now.

(Thereupon the transcripts above referred to were marked for identification as Plaintiff's Exhibits Nos. 18, 19, 20, and same are herewith set out as follows):

246 PLAINTIFF'S EXHIBIT No. 18.

Railroad Commission of Texas Oil and Gas Division.

Case No. 26,868, Rule 37.

In Re: Application of G. E. Burford for Special Permit to Drill Wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33 Acre Tract in the D. Sanchez Survey, Gregg County, Texas.

Hearing Held in Austin, Texas, State Capitol August 15, 1938, at 2:00 P. M.

Before: J. D. Copeland Jr., Examiner.

Record prepared by: Louise Kirk, Oil & Gas Division Railroad Commission, Austin, Texas.

Appearances:

Harry Pollard,
Austin, Texas.
Gordon Griffin,
Austin, Texas.
Dillard Estes,
Fort Worth, Texas.
Representing: G. E. Burford, Applicant.

R. W. Ketelsen,
Tyler, Texas.
Representing: J. G. Beard, Protestant.

J. B. Robertson,
Austin, Texas.
Representing: Magnolia Petroleum Co., Protestants.

J. W. Stayton,
Austin, Texas.
Representing: The Atlantic Refining Co., Protestants.

C. B. Jeffrey,
Austin, Texas.
D. M. Collingwood,
Dallas, Texas.
Representing: Sun Oil Co., Protestants.

Mr. Robertson:

By way of plea in abatement and objection to the consideration of this application I wish to call the attention of the Commission and the Examiner to the fact that an application of Mamie Hammond to drill either one or more wells on this same strip of land was granted by the Railroad Commission sometime ago and that the Sun Oil Company and Magnolia Petroleum Company filed an appeal from that order in the District Court of Travis County, Texas, being Cause 54769 entitled Magnolia Petroleum Company et al vs. Railroad Commission, Mamie S. Hammond et al, and that a trial of that case was had and on the 31st of January, 1935, a judgment was rendered by that Court cancelling the permit and order of the Railroad Commission and enjoining the defendants Mamie S. Hammond and husband O. O. Hammond and intervener T. S. Schroeder, their agents, servants and legal representatives from drilling or attempting to drill or permit to be drilled or produced or permit to be produced oil, gas and so forth from any well drilled under that permit. In that connection I want to offset in evidence a certified copy of that judgment. I also want to make a part of the record the proceedings in that case. May it be agreed that the proceedings in that case as now on file in the District Court can be considered as part of this record without bringing certified copies?

Mr. Pollard:
Subject to objection as to materiality?

Mr. Robertson:
That is right.

Mr. Pollard:
I don't require that you bring certified copies. I will waive the certification of it but I don't agree to the materiality or admissibility of it on any ground because the judgment speaks for itself and the judgment has been introduced in evidence which merely restrained the drilling and production of oil from that particular well under that particular permit which is set forth by number in the judgment.

Mr. Robertson:
I make the pleadings part of this record. Is that agreed, that the pleadings in that case may be made a part of this record without bringing the pleadings in but merely furnishing you a certified copy thereof later on?

Mr. Copeland:
As far as we are concerned, an uncertified copy would be all right.

Mr. Robertson:
Then I will furnish an uncertified copy.

Mr. Copeland:
I think it will be all right as far as we are concerned.

Mr. Pollard:
It is a useless encumbrance of the record because there were quite a number of pleadings filed by the various protestants or parties to the suit, plaintiffs, interveners, and two defendants and one intervening defendant, none

of which could have any materiality to the present hearing, his present objection going only, as I understand it, in the nature of a plea in abatement to this hearing on the ground that that judgment constitutes an adjudication of the present matter and application.

Mr. Copeland

I think it would be material to this extent that they would show the situation as it was at that time compared to the present time.

Mr. Robertson:

In connection with this we show to the Commission that the judgment of the District Court cancelling this permit was made on the ground that the Mamie Hammond strip which is the same strip we have here now, constituted a subdivision made in derogation of Rule 37 and there was no issue in that case as to the extent of drainage. It was admitted by everybody that the tract was being drained and it was contended by the plaintiffs in that case that their wells were not only draining the tract but would if permitted to operate during the producing life of the field drain all the recoverable oil from under that tract. And in that connection we make the contention that there have been no changed conditions in this case which would justify the reopening of this case because it was admitted in that trial that the tract was being drained and if there is any change in conditions it could only be perhaps a slight hastening of drainage by drilling of additional wells. Therefore we contend that the decision in that case is res adjudicata of the right to drill a well on that strip and binding on the Railroad Commission and that the Railroad Commission has no jurisdiction to hold this hearing.

Mr. Jeffrey:

Sun Oil Company objects to the consideration of this application because there is now pending in the District

Court of Travis County Case 53915 styled Sun Oil Company vs. Railroad Commission of Texas, a lawsuit involving the validity of the permit on this same tract of land and—

Mr. Copeland:
What permit is that?

Mr. Jeffrey:
It did involve the permit prior to the one he talked about. That suit is still pending.

Mr. Robertson:
Magnolia Petroleum Company will adopt that objection.

Mr. Jeffrey:
For the purpose of the record I would like to agree with Mr. Pollard to bring the pleadings in Case 53915—We have a statement from the clerk it is still pending—to show the land involved.

Mr. Copeland:
I think he will agree with you to that extent.

(Discussion outside the record.)

Mr. Pollard:
I will agree with you as to the facts which I detailed off the record.

Mr. Jeffrey:
We had any number of grounds for attacking the permit and there has been no adjudication of any of them.

Mr. Pollard:
I will say that the first permit has been abandoned long since and was abandoned at the time they applied for and obtained Mamie Hammond No. 1.

Mr. Jeffrey:

Will you let me furnish just a plain copy and not a certified copy of the petition?

Mr. Pollard:

Subject to our objection to the materiality of it and admissibility of it on other grounds besides lack of certification.

Mr. Jeffrey:

You will not object because they are not certified?

Mr. Pollard:

No.

Mr. Copeland:

The Commission has decided they will rehear this case as shown by the notation on this file.

Mr. Robertson:

Is this a rehearing on the Mamie Hammond application?

Mr. Copeland:

No. It is a hearing on the Burford application which is on the same tract as the Mamie Hammonds tract.

Mr. Jeffrey:

With the understanding that we can furnish uncertified copies of the plaintiff's petition in Case 53915 I hand you a letter under seal by the District Clerk of Travis County showing that that case is still pending and by virtue of that fact we insist that the jurisdiction over this matter is in the judicial branch of the government and that the Railroad Commission is without jurisdiction.

Mr. Copeland:
The Commission has assumed they have jurisdiction and have set the case for hearing and for the benefit of everybody here we will try it on its merits.

Mr. Jeffrey:
I would like to adopt the objection made by the Magnolia Petroleum Company on behalf of the Sun Oil Company with respect to Cause 54769.

Mr. Robertson:
I want to make an additional objection and that is to this effect that it is necessary that the Railroad Commission pass upon the question as to change conditions before it has any jurisdiction to entertain this application and it appears from the notation made on the file by the Railroad Commission that that matter has been passed on and they have decided to entertain this application prior to any hearing and none of the protestants were given an opportunity to appear before the Railroad Commission to give any evidence as to any change in conditions and on behalf of the Magnolia Petroleum Company I want to protest that as arbitrary and such action of the Railroad Commission as is invalid and beyond their jurisdiction. They have no jurisdiction to make any order or come to any decision on this application until after hearing is held at which protestants have an opportunity to present their evidence and objections.

Mr. Jeffrey:
We adopt that objection on behalf of the Sun Oil Company.

Mr. Copeland:
We will overrule the objection and proceed with the hearing.

Mr. Pollard:

At the outset may I say, Mr. Copeland, that the applications for the present permits seeking the authority to drill and operate wells numbers one to four inclusive by Mr. G. E. Burgord on the Fuller tract in question are sought primarily on the ground of prevention of underground physical waste of oil and gas and secondarily on the ground of preventing confiscation of the property of G. E. Burford, the owner of the lease on this tract of land and of the fee owner thereof. I would like to offer the testimony of Mr. Gordon Griffin whom I will ask to be sworn.

Mr. Robertson:

Before you go any further I want to make an additional objection to this permit on this same strip on the ground that a permit was denied on this tract by the Railroad Commission in 1938 in Case 25,562 and that this was res adjudicata of this application and I desire to make everything in that file and all the evidence in that case a part of the record in connection with our objection here.

Mr. Pollard:

In reply, may I state that the Supreme Court of our State disagrees with counsel because they have expressly held in the case of Magnolia Petroleum Company vs. New Process Production Company and the Railroad Commission that the denial of a permit application by the Commission does not and can not constitute an adjudication, a final adjudication, of the rights to a permit so applied for but that the Commission itself may again have a hearing and upon hearing after notice grant an application previously denied, recognizing that the Commission, being human, like all other humans, is subject to mistake and an appeal need not be taken to the Courts from the denial order. I offer and will furnish to the Examiner

a copy of that judgment or opinion should the Examiner desire it.

Mr. Copeland:
I have a copy of it.

Mr. Pollard:
We will offer the original assignment of the lease and ask to substitute a photostatic copy. We offer the assignment of oil and gas lease from T. S. Schroeder to G. E. Burford.

Mr. Robertson:
Is that the same lease Mamie Hammond claimed under?

Mr. Pollard:
It is a new instrument but covers the same tract of land.

Mr. Robertson:
Is this an assignment of the lease she cla ied under or a new lease? Is it a different lease from the one she claimed under?

Mr. Pollard:
It is the same basic title. Mamie Hammond obtained a lease and then leased it to Schroeder and Schroeder has assigned it to Burford.

Mr. Robertson:
Then it is the same lease Mamie Hammond claimed under.

Mr. Pollard:
We offer that instrument in evidence.

Mr. Copeland:
It will be the applicant's Exhibit No. 1.

Mr. Pollard:
It has not yet been recorded. It describes 2.81 acres out of the original W. L. Fuller 100 acre tract more or less which was subsequently leased by a metes and bounds conveyance of the east 50 acres which by assignment is now owned by the Magnolia and the west 50 acres by metes and bounds which by assignment is now owned by the Sun Oil Company, it being the tract extending north and south and lying between the Magnolia and Sun Company leases. It is described in here by metes and bounds as being 2.81 acres of land. I will use Mr. Griffin as a witness.

Mr. Stayton:
Let the record show the Atlantic adopts the other protests which have been made.

Mr. Pollard:
Shall I prove up Mr. Griffin's qualifications or will you admit them?

Mr. Stayton:
We will admit them generally.

Mr. Robertson:
For the purpose of this hearing only the Magnolia waives testimony as to his qualifications generally.

Mr. Jeffrey:
We will waive them generally.

Mr. Stayton:
We don't admit he knows anything about this particular lease but admit he is generally qualified.

Mr. Jeffrey:

You need not qualify him on my account.

257 MR. GORDON GRIFFIN, having first been duly sworn as a witness, under oath testified as follows upon examination by Mr. Pollard:

Q. Mr. Griffin, I hand you a plat which is attached to the application of Mr. Burford for the permits which he seeks in this hearing and will ask you whether or not you have made a study or investigation of the area depicted thereon, being the G. E. Burford 2.81 acre tract and the Magnolia Fuller 50 acre tract to the east and the Sun Oil Company 50 acre tract to the west?

A. I have.

Q. Have you also studied the drainage conditions which exist there with respect to the drainage of oil from the G. E. Burford tract by the Magnolia and Sun offsetting wells respectively?

A. I have.

Q. State whether or not in your opinion the wells offsetting the G. E. Burford W. L. Fuller tract to the east, namely, wells Nos. 1, 5 and 6, are draining the G. E. Burford tract?

A. They are.

Q. They are draining oil from beneath it?

A. Yes.

Q. With respect to the Sun Oil Company wells Nos. 2, 7, and 5 state whether or not in your opinion those wells are draining oil from beneath the G. E. Burford tract?

Mr. Robertson:

Just a minute. I think that before Mr. Griffin has qualified himself to testify as to an opinion as to drainage on that point he should make some showing that he has some familiarity with the conditions in the area and the

nature of the underground structure there. We make that objection to his giving any opinion as to drainage in that area.

Mr. Copeland:
Wasn't that admitted in the trial of this case in the Court house?

Mr. Robertson:
We object to his giving any testimony as to an opinion unless he shows—

Mr. Copeland:
Wasn't that an agreed fact in the hearing at the Court house?

Mr. Robertson:
I am willing to agree that the wells on both sides are draining this tract.

Mr. Copeland:
Is that what you are going to show?

Mr. Pollard:
Yes. I will bring out by him and he has testified that the Magnolia wells will drain some oil from beneath this tract and I assume he will answer that the names wells on the Sun Oil Company tract will drain some oil from this tract.

Mr. Griffin:
My answer is this—

Mr. Robertson:
I object to him giving any testimony as to drainage unless he shows he knows something about the structure in this neighborhood. I am perfectly willing to make the agreement.

Mr. Copeland:

I think if you agreed to that in the Court house—

Mr. Robertson:

I have offered to make the agreement.

Mr. Pollard:

If he has agreed to it in the Court house, it can hurt nothing if he answers the question. What was your answer?

A. It was yes.

Q. Have you made a study of the conditions in this area as reflected by the well logs shown on that plat?

A. Yes, sir.

Q. Being well logs filed with the Commission and constituting official files and records of the Railroad Commission?

A. Yes, sir.

Q. Have you made a study of the sand conditions shown to exist in this area as reflected by those well logs?

A. Yes.

Q. Will or will not the well logs as required by the Railroad Commission to be filed with it reflect the nature of the sand conditions in the area surrounding the wells the logs of which are filed with the Railroad Commission?

A. No, sir.

Q. In what respect do you mean that?

A. They will not show the san dconditions but it will show how much sand they penetrated and what they penetrated other than sand and how deep the wells are drilled and how completed and what the initial production was and the formations penetrated by the driller.

Q. What further study have you made of the conditions in this area?

A. I have determined the number of pumping wells and the wells producing water and the nearness of this

area to the east side of the field and its position on the structure and practically everything that is necessary or possible to learn about it.

Q. With the best knowledge that petroleum engineers and geologists have?

A. Yes.

Q. Have you or not prepared on a duplicate plat to the one attached to the present application any data relative to the drainage influence of the wells as depicted on the applicant's plat?

A. I have.

Q. Do you have that plat with you?

A. Yes.

Q. What does the plat which you have presented me disclose with reference to the drainage conditions in the respective wells shown here?

A. It reflects an area surrounding each well that is 330 feet from that well. In other words this area which I have colored in pink or red is that portion of the W. L. Fuller lease which is at a greater distance from any well than 330 feet.

Q. As I understand it, the circles which are drawn around each well shown on this plat have a radius of 330 feet?

A. That is true.

Q. With each well shown being in the center, the exact center, of the circle?

A. It reflects an area surrounding each well that is 330 feet from that well. In other words this area which I have colored in pink or red is that portion of the W. L. Fuller lease which is at a greater distance from any well than 330 feet.

Q. As I understand it, the circles which are drawn around each well shown on this plat have a radius of 330 feet?

A. That is true.

Q. With each well shown being in the center, the exact center, of the circle?

A. Yes, sir.

Q. What is the significance of the radius of 330 feet?

A. That is the Commission's spacing rule for the East Texas field, that wells must be spaced 330 feet from the line or 660 feet from other drilling or producing oil wells.

Mr. Stayton:

We will object to any plat showing any 330 foot radius because it is not material. It should be 466 feet if he wants to introduce such a plat.

Mr. Jeffrey:

We object further to this witness testifying as to what the Railroad Commission's rules mean as we have not understood that he attempted to qualify as an expert on that line, embodying as it does any number of legal matters, and we have no objection to him stating what is upon the map subject to our objections as to its materiality but we strenuously object to any conclusions by this witness as to what it means.

Mr. Pollard:

He has only stated that the reason he took the 330 foot basis to use it as a radius was because that is the minimum distance at which wells can be drilled by the Commission's order without special permits. That is a matter of common knowledge and isn't an attempt to construe the rule but is merely showing why he took the radius of 330 feet.

Mr. Robertson:

I want to add an additional objection that Rule 37 while it calls for wells spaced a minimum of 660 feet apart without special exceptions which involves the drainage diagonally of wells so spaced, the midpoint of which is ap-

proximately 466 feet, that Rule 37 does not provide or imply that the drilling of wells slightly further apart than that will cause waste but only provides and implies that the drilling of wells closer than that will cause waste and there is no finding of the Commission that wells will drain a minimum of 466 feet but only a finding that wells spaced closer than that will cause waste.

Mr. Jeffrey:
We adopt that objection.

Mr. Pollard:
That is just an interpretation of the rule with which we disagree.

Mr. Stayton:
We make one further objection and that is that it has been covered before but we want to object to the testimony because the former suit is res adjudicata because at that time there were fewer wells drilled on the surrounding tracts than at the present time and Mrs. Hammond being in privity with the applicant, she being in his chain of title, he is bound by everything litigated in that case as well as what could be litigated there and we object to any testimony on the waste feature for that reason.

Mr. Robertson:
There couldn't be any show of changed conditions.

Mr. Stayton:
Any change in conditions would be against their position.

Mr. Copeland:
We will go ahead.

Mr. Robertson:
Can we have it understood that these objections apply to all the testimony all the way through without being repeated?

Mr. Copeland:
Yes.

Mr. Jeffrey:
That was our understanding at the outset.

Q. As I understand it, your testimony is that you took the 330 foot basis for the radius of the circles drawn around each of these wells because of the fact that that is the minimum distance at which wells can be drilled without invoking the special exception contained in Rule 37?
A. That is true.

Mr. Robertson:
Mr. Copeland, I understand that these objections have been overruled; is that correct?

Mr. Copeland:
Yes.

Q. You used the 330 foot radius to show what with respect to drainage?
A. I used that to show the present development program within the area, showing that under the Commission's spacing order of 330 feet it will show that portion of each of the leases that will be drained of the per cent of recovery that the Commission desires under the 10 acre spacing program—

Mr. Jeffrey:
May we have our objection to that question and answer too, Mr. Copeland?

Mr. Copeland:
Yes.

Mr. Stayton:
On the ground of what the Commission desires. That is strictly a conclusion.

Q. Does each circle surrounding each well shown on this plat indicate the drainage area, the effective drainage area, to more or less an extent, of the individual well which is located at the axis?

A. Yes, sir, it does.

Q. I notice that you have, as you mentioned, areas extending through the locations in the center of the G. E. Burford tract which are colored in pink or red. That area which is so colored is that the area which is or is not being efficiently drained under the 300 foot drainage influence of the wells on the offsetting tracts?

A. It is.

Q. What?

A. It is an area that is not being adequately drained under the 330 and 660 foot spacing.

Q. With reference to the proposed locations of the G. E. Burford No. 1, do you have a circle extending around that well with that well used as the axis?

A. I have a red circle extending around that well with the center of the radius at the No. 1 location.

Q. Is that radius the same distance or greater or less than the radius of the other circles?

A. It is an equal distance, an equal radius.

Q. Does the area which is included within that circle or not indicate the area which will be drained through the operation of the well No. 1 in the production of oil and gas?

A. It does.

Q. Does that plat likewise show the same data with respect to the locations for the proposed Burford well No. 2?

A. Yes, sir.

Q. And likewise for the locations for wells Nos. 3 and 4?

A. Yes, sir.

Q. And if the four wells applied for are drilled and are operated in the production of oil and gas, would or would not the area which is colored there and which you have indicated to be the areas which would not be effectively drained by the surrounding wells be drained of the oil by the drilling and operation of those four wells?

A. It would.

Q. Mr. Griffin, as shown by that plat, what is the distance between the Sun Oil Company well No. 1 and the nearest offsetting well on the Magnolia tract?

A. 1050 feet.

Q. That Magnolia well is the No. 1 well?

A. Yes.

Q. What is the distance between the Sun No. 2 and the Magnolia No. 1?

A. 740 feet.

Q. What is the distance between the Sun No. 2 and the Magnolia well No. 6?

A. 850 feet.

Q. What is the distance between what is shown as the Beard well No. 1 and the Magnolia well No. 1?

A. 1170 feet.

Q. What is the distance from what is shown to be the Beard well No. 3 to the Magnolia well No. 1?

A. 800 feet.

Q. What is the distance between what is shown to be Beard No. 9 and Magnolia well No. 1?

A. 730 feet.

Q. What is the distance from the Sun well No. 2 to the Beard well No. 3?

A. 1020 feet.

Q. What is the distance between the Sun well No. 2 and the Beard well No. 9?

A. 1340 feet.

Q. What distance is there between the Magnolia well No. 1 and the Magnolia well No. 6?

A. Approximately 715 feet.

Q. What is the distance between the Sun well No. 7 and the Magnolia well No. 1?

A. 1000 feet.

Q. What is the distance between the Sun well No. 5 and the Magnolia well No. 6?

A. 975 feet.

Q. What is the distance between the Sun well No. 7 and the Magnolia well No. 5?

A. Approximately 1000 feet.

Q. What is the distance between the Sun well No. 5 and the Standard of Kansas No. 4?

A. 750 feet.

Q. And the distance between the Magnolia-Reserve well No. 4 and the Magnolia Fuller No. 5?

A. 950 feet.

Q. Did I ask the distance between the Sun well No. 5 and the Standard of Kansas No. 2?

A. It is 1050 feet.

Q. What is the distance between Magnolia well No. 5 and the Standard of Kansas No. 4?

A. 710 feet.

Q. I don't believe I asked the distance between Sun well No. 5 and its well No. 7?

A. 730 feet.

Q. What is the distance between the Sun well No. 6 and the Magnolia well No. 6?

A. 1100 feet.

Q. And the distance between Sun well No. 6 and the Magnolia well No. 5?

A. 1120 feet.

Q. Is there any well now located and producing in the area which is bounded by the Sun's wells Nos. 6 and 7 and Magnolia wells Nos. 6 and 5 and between the Sun and

Magnolia wells No. 5 on each of those respective tracts and between the Sun well No 4 and Magnolia No. 6? being the area located in between those wells.

A. No, sir.

Q. Is there any well now located and producing in the area bounded by the Sun Oil Company No. 2 and the Magnolia No. 1 and the Magnolia No. 6 and the Sun No. 7?

A. No, sir.

Q. Is there any well now producing within the area bounded by the Beard wells Nos. 1, 3, and 9 and the Magnolia No. 1 and the Sun Company No. 2 and the Sun Company No. 1 wells?

A. No, sir.

Q. Is there any well now producing in the area which is bounded by the Sun well No. 5 and the Magnolia well No. 5 and the Standard of Kansas No. 2 and No. 4 wells and Magnolia-Reserve well No. 4?

A. No, sir.

Q. In your opinion is it or not necessary for a well to be located and to produce oil and gas at the location applied for by each of the applications for wells 1, 2, 3, and 4 on the Burford tract?

A. Yes, sir.

Q. If no well is drilled within the four respective areas which we have been talking about as shown on this plat, will the wells which surround those four respective areas produce all the recoverable oil and gas from beneath those four respective areas?

A. They will not.

Mr. Stayton:

We object to the testimony on the predicate laid so far as it is a collateral attack on the rule.

Mr. Jeffrey:

We join in that objection.

Mr. Robertson:
Magnolia also joins in the objection.

Mr. Copeland:
I overrule the objection.

Mr. Stayton:
Note our exception.

Q. If the four permits which are applied for are granted and those four respective wells are drilled at the locations at which they are applied for, will that or not cause or tend to cause uniform spacing in that area?

A. It will and the map clearly reflects that.

Q. With respect to the drainage areas which appear to overlap as between the circles which are drawn around the four locations applied for here and the offsetting wells, will there or not be an increased recovery of oil from the overlapping areas there by virtue of drilling and operation of these four wells?

A. There will be.

Mr. Stayton:
We have the same objection to that testimony too.

Mr. Jeffrey:
Sun joins in the objection.

Mr. Copeland:
Objection overruled.

Q. Will that be small or large, that increased production and recovery of oil?

A. I think it will be material.

Mr. Robertson:
May it be understood that we have the same objection to all this character of testimony.

Mr. Copeland:
Yes.

Mr. Robertson:
And it is understood that objection is made and overruled?

Mr. Copeland:
Yes.

Mr. Stayton:
I want to ask one question as the basis for an objection. Mr. Griffin, you believe the greater the density in the East Texas field the greater the recovery?
A. I think most of the engineers agree as to that.

Mr. Stayton:
I asked if you did?
A. I join in that belief.

Mr. Pollard:
I think the Commission has made that same finding by its own orders. It isn't inconsistent with the administrative and fact finding views of this body.

Mr. Stayton:
You think that wells drilled less than 660 feet apart will increase the recovery in East Texas?
A. I do.

Mr. Robertson:
That is the basis of all your opinions?
A. No, sir.

Mr. Robertson:

The opinions you have just expressed as to increased recovery is based on that?

A. As to the basis of my opinion, it is based on that, uniform spacing and closer drilling.

Mr. Robertson:

Then we want that blanket objection to everything in this case based on what has been stated so far.

Mr. Copeland:

All right.

Q. Will there be a less or greater recovery of oil from beneath the area which you have shaded in pink or red on this plat if these four wells are drilled at the location applied for?

A. I think that there will be a substantially greater increased recovery by the drilling of those four wells.

Q. Will the drilling of each of those four wells cause the production of oil or gas from beneath such pink areas which would not otherwise be produced and recovered by any of the other surrounding wells in this area?

A. It would.

Q. Would that be small or large?

A. I think it would be large.

Q. You previously testified as I understood you that the wells nearest to the Burford tract on the Magnolia tract are draining some oil from beneath the Burford tract and that the named wells on the Sun Oil Company tract nearest the Burford tract were draining some oil from beneath this tract. Are those wells and would those wells during their producing life time produce or will produce all the recoverable oil in the sands beneath that area under the Burford tract?

Mr. Jeffrey:
We object to that question.

Q. Would the drilling of the four wells applied for produce oil which those offset wells could not and would not obtain?

Mr. Jeffrey:
Which question do you want him to answer?

Mr. Pollard:
It is just one question.

Mr. Jeffrey:
We object to that question because there is no proper predicate laid for asking the question and the answer to the question would be an attack on the rule itself with the evidence that has been adduced and we therefore submit that no proper predicate has been laid for the question and objects to the question nd to this witness's attempt to answer it.

Mr. Copeland:
I think he has laid his predicate by stating the closer he drills wells the more recovery he will get.

Mr. Jeffrey:
Note our exception.

Q. Mr. Griffin, in your opinion would the drilling of any or all the wells applied for cause or tend to cause any underground physical waste of oil and gas?
A. No, sir, I think it will tend to prevent underground waste of oil.

Mr. Stayton:

That is a different question but we have the same objection.

Mr. Jeffrey:

We have the same objection.

Q. In your opinion would there be a greater or lesser ultimate recovery from the entire field if the four wells applied for are drilled or would there be less recovery if they are drilled?

A. There would be a greater recovery.

Q. Would that likewise apply to the recovery of oil in this particular area?

A. Yes, sir.

Q. Where is this area situated with respect to the northeast edge or boundary of the East Texas field?

A. The east side of the field in this area is approximately the east side of the Magnolia Petroleum Company's Fuller lease.

Q. Are there any producing wells situated in a more easterly direction to the Magnolia's Fuller tract?

A. No, sir, there are none east of it.

Q. In your opinion and from the investigation you have made is there any woodbine water underlying this lease?

A. No, sir, there is not.

Q. Or underlying either of the adjacent leases, the Sun tract or the Magnolia tract?

A. No, sir.

Q. Or the Beard tract to the south or the Standard or Reserve and Magnolia leases?

A. No, sir.

Q. Where, if you know, is the closest woodbine water to this tract to the west?

A. It is several miles.

Q. In your opinion is it probable or possible that the drilling and production of oil from the four wells applied

for would cause any channeling or coning of the water in the sands or infiltration of water through the sands in this immediate area to drive off any oil?

A. No, sir.

Q. We offer the plat with the matters shown thereon, the plat which is a duplicate of the plat attached to the application for these four wells as our Exhibit No. 2.

Mr. Jeffrey:

We have our previous objections to the offer and renew the same objections to the offer of the plat.

Cross Examination of Mr. Griffin by Mr. Robertson:

Q. In your opinion are the structural conditions, the underground structural conditions substantially uniform under the Sun and Magnolia leases and under the strip between them that is involved in this case?

A. Definitely they are not.

Q. What are the differences?

A. The Sun has a pumping well on their property, their No. 5.

Q. The numbers you used on this plat are different from the ones on our plat. You say well No. 5 of the Magnolia is a pumping well?

A. No. 5 of the Sun.

Q. What else?

A. No. 9 up on the J. G. Beard.

Q. Is that well producing its minimum per day of 20 barrels?

A. I assume that it is.

Q. I am not asking for an assumption. You don't know?

A. No.

Q. What other differences are there?

A. No. 9 of J. G. Beard is a pumping well.

Q. Do you know whether that well is producing its minimum of 20 barrels a day?

A. I couldn't answer that.

Q. What other differences are there, in the structural conditions under this land?

A. That is all I know of.

Q. So far as you know—is it or not your opinion that except for the fact that those two wells are pumping that the oil producing structure beneath the Sun Company lease and the Magnolia lease and the applicant's strip is substantially the same with regard to porosity, permeability and other conditions which affect the migration of oil in this East Texas oil field?

A. No, sir. On initial completion and potentials of the various wells have quite a bit of difference. That shows there is a difference in the sand conditions.

Q. Isn't that information very unreliable in the well logs on account of the fact they use different chokes and the initial production is made under different conditions and perhaps not very carefully recorded.

A. I don't know how careful it is but it is a sworn record by the operator who drilled the well.

Q. Does it show how long they operate and what size choke they used?

A. It shows how long the test was. The first hour tes after completion. The ones which I have looked at are the first hour test.

Q. Are there any differences in the initial production?

A. We will take the Magnolia. The No. 6 well made 80 barrels the first hour.

Mr. Copeland:

What kind of choke?

A. It doesn't give the choke.

Q. Then you can't tell anything about it unless you know the size of the choke?

A. Some of them give the choke. Practically all of them were through open tubing.

Q. You weren't there?

A. I am reading the logs.

Q. Does it say open tubing?

A. Yes. No. 4 of the Magnolia the first 24 hours—it made 100 barrels first hour through open 2 inch choke or 2½ inch tubing.

Q. That wouldn't be called a choke, would it?

A. It is a choke. It is probably just the size of the flow line they had.

Q. It only produced 100 barrels the first hour?

A. Yes.

Q. When was that well completed?

A. It was completed December 7, 1936.

Q. What is another one?

A. The No. 3 of the Magnolia pumped 50 barrels the first day. That is considerable difference. One of them flowed 100 barrels an hour and another one pumped 50 barrels a day.

Mr. Copeland:

When was that completed?

A. It was completed in April 1936, about 7 months prior.

Q. It is very close to the east edge of the field, isn't it?

A. Right here.

Mr. Copeland:

It is the most easterly well, isn't it?

A. No, sir. The No. 4 which flowed 100 barrels a hour is shown east, further east than that one. That is the inward well from the original one. The outward well is on the pump.

Q. The Pender & Jones which offset the No. 3 is a dry hole, isn't it?

A. Yes.

Q. Then that is right on the edge of the field?

A. Yes.

Q. In your opinion doesn't that explain the reason why it had to be pumped from the start and produced so little oil?

A. There are some dry holes all along that edge over there.

Q. What other initial productions do you have?

A. That shows a pretty big variation. I doubt if I could ever find a larger one.

Q. I want them on all these two leases.

A. Here is one on the No. 2 of Magnolia. 60 barrels the first hour through tubing.

Q. Does that show what sized tubing?

A. It doesn't show but I am sure that is what it is.

Q. If it doesn't show, you can't tell anything about that.

A. I couldn't swear to it but it is my opinion that it was.

Q. What else do you have?

A. I have some on the Sun lease. Sun No. 7 made 28 barrels in 30 minutes through open tubing.

Q. What size? No size shown?

A. It shows open tubing.

Q. And no size shown? No size of tubing shown?

A. Sure it is shown. 2 inch.

Q. Does it show that is the tubing that the initial production was through?

A. Yes.

Q. That is 28 barrels in 30 minutes?

A. Yes. 56 barrels an hour.

Q. When was that completed?

A. In October, 1937

Q. That is Sun No. 7?

A. Yes. Here is Sun No. 4. It made 45 barrels an hour through 2 inch tubing.

Q. When was it completed?

A. April.

Q. 45 barrels an hour. That is less than the No. 7 produced per hour, isn't it?

A. Yes.

Q. No. 7 was 56 barrels an hour. The No. 4 is further west and therefore should be a better well, shouldn't it?

A. Yes.

Q. What is the next one?

A. Sun's well No. 3 made 7 barrels an hour through tubing.

Q. The size isn't shown?

A. No. It wouldn't flow so they put tapered tubing in to make it flow. It is a sick well. That is customary to use tapered tubing when you have a sick well.

Q. It makes the opening smaller?

A. Yes.

Mr. Copeland:

It is the same as a 1 inch choke.

A. Here is the No. 2 which is a short distance from it. It is eastward and should be a worse well. It made 37 barrels an hour through tapered tubing, the same sized tapered tubing. It made 37 barrels and the No. 3 made 7 barrels.

Mr. Jeffrey:

You don't have the size of the taper?

A. Yes. It is from 2 inches to 1½ inches to 1 inch.

Mr. Jeffrey:

The same on the No. 3?

A. Yes. 2 to 1½ to 1.

(Robertson):

Q. When was that completed?

A. In 1932. Both of them.

Q. The No. 2 and the No. 3 were both completed in 1932?

A. Yes. Now 3 was in November 1932 and No. 2 was in May. And the Sun No. 5 made 26 barrels an hour.

Q. Through what?

A. It doesn't say. I would say it was 2 inch tubing.

Q. I would rather you didn't give your opinion. If you don't know what it was just say you don't know. If it doesn't show, just say it doesn't.

A. I think I know enough about it to say that. In my opinion as an engineer it is open tubing.

Q. I want him to just answer what I ask him and not interpolate statements I didn't ask for.

Mr. Pollard:

We submit he has the right to submit his answers without answering yes or no, and he is qualified to state his opinion by his experience as an engineer.

A. If all of them are through open tubing—I don't think they would choke one of them.

Q. I just asked what the report showed.

A. The report doesn't show that it is choked. It shows it has 2 inch tubing.

Q. Does it say 2 inch tubing on the report?

A. Yes.

Q. But it doesn't show whether its initial production is through the tubing or not.

A. That usually—

Q. It doesn't show whether it is through a choke or not?

A. No.

Q. Please tell me again what was the initial production of that well?

A. 26 barrels per hour.

Q. Is there any other reason except these variations which lead you to say that there is a variation in the

character of the producing structure underground in this section? Anything else or any other reasons you have for making that statement.

A. That is sufficient reason. In my opinion, you know, it is a lot of difference.

Q. You don't know what the characteristics are beneath this strip?

A. What do you mean?

Q. Do you have any opinion as to the nature of the producing structure under the strip involved in this case?

A. No, sir.

Q. Is it—what is your opinion as to its similarity to the structure on both sides?

A. It would be higher on one side and lower on the other.

Q. What side?

A. Thicker on the west and thinner on the east. That is, generally speaking.

Q. Uniformly? A uniform variation?

A. No.

Q. If there are variations, you don't know where they are and have no opinion as to where they are?

A. Yes, I do.

Q. Where are they in your opinion?

A. These well logs show that there is the—that there isn't the same amount of sand underneath any of them.

Q. I am taking about the strip.

A. We haven't drilled any on the strip and I couldn't tell you that.

Q. Have you any opinion as to the porosity of the oil sand underneath the strip as compared with the oil sand immediately to the east and west?

A. No.

Q. It may be better or worse under the strip?

A. Yes.

Q. And the same as to the permeability?

A. I would say that the permeability is a little—is a lot different.

Q. Different under the strip from that immediately to the east and west?

A. I don't know about the west because we haven't drilled it. I couldn't answer that.

Q. The strip might be very much more permeable than the structure immediately east and west?

A. Yes.

Q. And it might be very much less permeable?

A. That is right.

Q. You have no opinion either way?

A. No, sir, that is why we have to drill these wells.

Q. If it comes to a question as to whether a well drilled at the location of No. 2 on the strip will produce more oil than a well 100 feet to the east or 100 feet to the west you wouldn't have any opinion at all, would you?

A. Produce more oil?

Q. More total oil.

A. I would not. I couldn't tell you which well would dry up first.

Q. Take the location of the well No. 2 and take a well offsetting it to the west equidistant from the edge of the strip and another well equidistant to the east. You have no opinion as to which of those three wells would produce the most oil?

A. No, I don't.

Q. You would give the same answer with regard to locations Nos. 1 and two offset wells?

A. I would give the same answer to any undrilled well in this area.

Q. Then you couldn't give an opinion that a well drilled at any one of the locations 1, 2, 3, or 4 would cause more ultimate production of oil or less than the offset well drilled to each or any of those locations to the east and west.

A. Under the present conditions a well drilled at either 1, 2, 3, or 4 will tend to increase the ultimate recovery from the field and from this area.

Q. A well 50 feet west of location No. 1 might increase it more, mightn't it?

A. It would increase it more.

Q. And a well 50 feet to the east of the line of the strip at that point might increase it more.

A. It would increase it still more if all three wells were drilled.

Q. I mean if the No. 1 isn't drilled.

A. I can't answer that.

Q. You wouldn't know?

A. No.

Q. You wouldn't know which location would be the best to drill a well to get more oil?

A. No. I would say if you are going to drill that way, drill all three of them.

Q. I'm not asking that. You would give the same answer with reference to each of the locations?

A. Yes.

Q. The testimony you have given as to the distances of the wells from each other is based entirely on the plat?

A. On the sworn map.

Q. You don't know anything about the distances yourself?

A. The only thing is from the application.

Q. You just took the map or plat as being correct?

A. And the Magnolia's own records and the Sun's own records.

Q. Did you do any scaling?

A. They are marked on here.

Q. You didn't testify from that.

A. I have it here to check that with.

Q. Did you check it?

A. I can.

Q. You don't know without checking whether it is the same or different, do you?

A. I have checked several and they have been approximately the same.

Q. In arriving at the distances you mainly did it by scale?

A. I did. Every answer I gave was by scale.

Q. Scaling on this kind of a map can be off from 15 to 40 feet or perhaps more?

A. I think that 20 feet would get it.

Q. The size of the dot for indicating a well alone, if the well doesn't come exactly in the center of it—the dot could throw you off 30 to 40 feet?

A. I measured from the center of the dots.

Q. If the dot were not correctly placed that could throw you off 30 or 40 feet?

A. If this licensed engineer didn't prepare his plat correctly then I am wrong. If he did prepare it correctly under his affidavit my measurements are right.

Q. Except that the paper stretches and shrinks, doesn't it?

A. Of course it will shrink a little.

Q. So that the distances you have given in scaling could be off to that extent?

A. I could be off a whole lot and still my answers would be the same because it is such a great distance.

Q. That is all.

Mr. Copeland:

We will recess for a few minutes.

Cross Examination of Mr. Griffin by Mr. Jeffrey:

Q. Mr. Griffin, you were present at the Cecil Cammack application for three wells on this tract, weren't you?

A. I was.

Q. Did you present in that hearing a map like the one which you have offered as the applicant's Exhibit 2?

A. I did.

Q. As I understand your testimony, it was to the effect that even spacing and increasing the number of wells was your idea of increasing ultimate recovery?

A. Yes.

Q. If you were to drill a well in the center of any one of these four red areas such location would not fall on the strip in question; is that right?

A. If you were to drill one in the center, I believe in the previous application it shows that they were lettered A, B, C, D, and E—

Q. That is in the Cammack application?

A. Yes.

Q. On Exhibit No. 2, applicant's Exhibit No. 2, in that case?

A. Yes.

Q. In one red circle here you would drill on the Sun's Fuller lease?

A. To be in the center of the area, yes.

Q. And in the second one from the north you would drill on the Magnolia's Fuller lease?

A. Yes.

Q. And in the third one from the north you would drill on the Sun's Fuller lease?

A. Yes.

Q. And on the most southerly one of the four, you would drill on the Magnolia's Fuller lease?

A. Yes.

Q. Mr. Griffin, as I understand it, these circles have a radius of 330 feet?

A. Yes.

Q. You weren't telling the Commission that a circle with a 330 foot radius represents 10 acres?

A. No.

Q. Mr. Griffin, as a matter of fact if you drill wells at the four corners of a square 660 feet apart you would have 4 wells with a minimum spacing set out by the rule of 660 feet from other wells?

A. Yes.

Q. What would be the diagonal distance between the well in the northeast corner and the well in the southwest corner?

A. 466 feet.

Q. What would be the total distance between the wells?

A. 466 feet.

Mr. Copeland:

That would be the midpoint.

A. Yes.

Q. What is the distance between the two wells?

A. 933 feet.

Q. Half of that would be 466?

A. Yes.

Q. At the previous hearing on the Cammack application didn't you draw circles with a radius of 466 feet on the map?

A. Yes.

Q. That obliterated practically all of the area shown in pink when using the 330 feet radius?

A. Yes, sir. Let me qualify that. It is impossible to space wells 330 feet apart and have a regular distance between the wells so when they get 466 feet they leave oil in there which would not be recoverd.

Q. I understand your idea is that the more wells you drill the more oil you get.

A. That is right.

Q. But I assume if you drill at the four corners of a square 660 feet that would be as close as you can get the wells and leave alone the exception provisions of Rule 37?

A. Yes.

Q. And under your idea you would have a point in between those four wells which would be 466 feet from any well?

A. Yes.

Q. I understand that it is your idea that the closer you drill them the more oil you will get.

A. Let me see the map where I drew those circles.

Q. Mr. Griffin, you have changed your testimony in this hearing from what it was in the previous hearing. I wasn't present at the former hearing.

A. I don't think it has been changed a whole lot. There have been some changes. I don't recall all the testimony given the last time but I know I drew the same map and the same wells were used. There was additional evidence submitted in this hearing not submitted at the last hearing. There is considerable evidence in this hearing which wasn't submitted at the last hearing.

Mr. Pollard:

Only three were applied for the last time.

Mr. Jeffrey:

He is talking about existing wells.

Mr. Robertson:

The two records will show what was submitted.

Q. Mr. Griffin, with reference to the initial production figures which you gave, you have no way of knowing how the well was completed?

A. No.

Q. Whether it was completed with cable tools or rotary tools?

A. I think so.

Q. Did you take that into consideration?

A. I noticed some of them did show it. I know some of them were completed with cable tools.

Q. I ask you then of those completed with cable tools whether or not in your opinion the initial production was higher than it would have been if completed with rotary tools?

A. It should have been, everything being equal. Let me see. They were lower. They should have been higher but they were lower.

Q. In every instance?

A. In the instances which I checked.

Q. All I am trying to get at is how much information you had before you in arriving at your conclusions. Did you consider how each well was completed?

A. I only considered where the log showed it was completed with cable tools because that is all I had to go by.

Q. In each instance where that was shown you took that into consideration?

A. Yes.

Q. It is your testimony that in each instance where they were completed with cable tools the initial production was lighter?

A. Taking it into consideration, it didn't for my testimony—

Q. I am asking if you did take that into consideration.

A. I took it into consideration where it was shown on the log.

Q. Did you take into consideration in the wells completed with rotary the pressure on which the well was drilled?

A. No, I didn't.

Q. Did you consider whether the wells completed with a rotary were washed with water or oil or how they were brought into production?

A. No. I assumed by my answer that the operator would be sufficiently efficient to complete his well without plugging any pores in the sand and creating waste. I

assumed that a company the size of the Magnolia and Sun would complete their wells in the best scientific method known.

Q. But you don't know?

A. No, I don't know. If they didn't, they created waste and I am sure they did it for the prevention of waste.

Q. I don't know whether the Cammack application has been called to the Commission's attention, but it is Case No. 25,562.

Mr. Robertson:

I have introduced the whole file. I introduced it in connection with the objections by way of abatement. Perhaps it should be reoffered in connection with the hearing.

Mr. Jeffrey:

I would like to offer the testimony of the Sun Oil Company adduced in that hearing.

Mr. Pollard:

As I understand, the Sun didn't have any testimony in that hearing.

Mr. Robertson:

I will offer the whole file and record.

Mr. Jeffrey:

Mr. Ray testified. We reoffer that testimony.

Mr. Pollard:

I will object to that because Mr. Burford was not a holder of a lease covering this tract at that time and he does not have the advantage of hearing the testimony of the gentleman referred to as testifying in that hearing and no opportunity to cross examine and we have no knowledge of what it is about.

Mr. Jeffrey:

Mr. Burford has no connection with Mr. Cammack's interest?

Mr. Pollard:

We had no connection and were not present and did not aply for the permit at that time and we have no knowledge of it and Mr. Burford has no knowledge at this time of what Mr. Ray, the Sun's petroleum engineer, testified.

Mr. Copeland:

We will accept whatever our files on previous cases show.

Mr. Pollard:

I assume that the Commission will take cognizance of what is contained in all its files.

Mr. Copeland:

They do.

Re-Direct Examination of Mr. Griffin by Mr. Pollard:

Q. All the matters I am going to ask you about are contained in the Commission's files and in order to assemble it in the hearing I want to ask you to state if the Commission's records which you have disclose the exact completion dates of each of the wells on the Magnolia 50 acre tract and the completion dates of each of the wells on the Sun Oil Company's W. L. Fuller tract?

Mr. Robertson:

Why not put in all the logs or records and save time?

Mr. Pollard:

They take up too much room in the record and all we want is the matter which I am asking about which is the

completion date of each of the respective wells. I would be glad to save time to have it copied from the records. That is the completion date of each of the wells.

Mr. Copeland:
What difference would it make?

Mr. Pollard:
None at all.

Mr. Copeland:
I mean what difference would it make in this case when they were completed? We don't grant back allowable and it is only the question as to the situation on the ground and all you have to do is have them admit the wells are there.

Mr. Pollard:
There are two matters of argument. The first is with respect to the wells that are now drilled and located and are producing on each of these two tracts and the dates with respect to the development which occurred on each of the respective tracts subsequent to the filing of the first injunction suit against the first Hammond permit and subsequent to the judgment which was entered in the second suit which was filed against the second Hammnod permit for the No. 1 well on this particular tract, all of which would show changed conditions as to the drilling existing in this area and in the vicinity of this tract.

Mr. Copeland:
Why not limit it to those drilled and completed since that time?
A. I would rather put them all down.

Mr. Pollard:

As a matter of fact, I understand that there was only one well drilled on the Magnolia tract and a permit for the second well had been granted and there were three wells drilled on the Sun Oil Company tract at the time of the Hammond application. All the remaining wells on each of these respective tracts have been drilled since that time but the judgment and opinion are already introduced here and so the completion dates of the wells would show the wells that have been completed since that time. They will show another matter. It will show that obviously the wells which were then drilled on this tract now have proved to be insufficient to recover the greatest amount of recoverable oil from beneath those tracts so each of these companies has itself recognized that by coming in and drilling wells. We contend that our rights are such as existed as of the time of the subdivision, if any, and could not have been destroyed by their subsequent recognition of that fact by coming in and drilling additional wells. They cannot destroy our rights in the matter.

Mr. Jeffrey:

The rights as of the time that the subdivision was made have been adjudicated at least once and was pending a second time.

Mr. Pollard:

I say that the Magnolia and Sun cannot obtain an adjudication on one premises as being correct and then come in and pull a rabbit out of a hat by denying that which was adjudicated and come in and ask for more wells and I will say if there is such a thing as equity or good conscience they are estopped to come in or unfortunately then this is that kind of case where they cannot on one hand say to us our rights are finally settled and determined in a judgment and themselves flaunt that judgment in

our faces by coming in when they have a judgment, if it does say there is full development and determine there is full development—come in and drill additional wells in order for them to get more oil under the premises there was not and did not exist full development there. It is agreed we can furnish that?

Mr. Copeland:
Yes.

Mr. Robertson:
As far as we are concerned it is.

Mr. Copeland:
Go on with your examination of Mr. Griffin, Mr. Pollard.

Q. You testified, Mr. Griffin, that the cable drilled wells should have had higher production than the rotary drilled wells but they were in fact slower production. What is the significance of that, if any?

A. The answer is the same as the rest of them. It is due to a difference in sand conditions.

Mr. Stayton:
Mark off the offsets on the map which would be caused by the drilling of these four wells.

A. There would be one on each side.

(Pollard):
Q. Direct equidistant offsets?

Mr. Stayton:
Yes, within 330 feet.

A. I think that they could space a well to the south and eliminate one.

Mr. Stayton:

How many would that be?

A. 16 wels.

Q. Mr. Griffin, in your opinion would it be necessary for each of those proposed offset wells which you have pointed out on that plat as being the locations at which direct equidistant offset wells would be located to be drilled?

A. Yes, sir.

Q. Would that in your opinion prevent or cause waste, underground waste of oil and gas?

A. I think it would enhance the recovery of oil from this area.

Mr. Stayton:

Note our objection. We object to the conclusions on that line of questioning. We have a blanket objection to it.

Mr. Copeland:

All right.

Q. It would likewise increase the recovery from the field?

A. Yes, sir.

Mr. Jeffrey:

It would make for more uneven distribution of wells in the area?

A. Yes.

Mr. Stayton:

So in order to get that ultimate recovery under your theory it would be necessary to start another line of wells like that and continue through the area?

A. If they did, they would get a larger amount of recovery, far more than under the present set up.

Mr. Pollard:
We are through

Mr. Jeffrey:
We offer Mr. Collingwood. Have him sworn, please.

298 MR. D. M. COLLINGWOOD, having first been duly sworn as a witness, under oath testified as follows upon examination by Mr. Jeffrey:

Q. State your name, vocation and employment.
A. D. M. Collingwood, geologist and petroleum engineer, Sun Oil Company.

Mr. Copeland:
Shall he qualify him. He has testified here before.

Mr. Pollard:
We will admit it generally as to his qualifications and knowledge for the purposes of this hearing.

Q. Mr. Collingwood, have you had any experience in the East Texas field?
A. Since the first year of the field, yes.
Q. Were you ever located in the field as geologist and petroleum engineer for the Sun Oil Company?
A. Yes.
Q. Have you made a continuous study of that field since that time?
A. I have.
Q. Mr. Collingwood, have you made any bottom hole pressure tests of any well in this immediate area?
A. Yes. We have kept records on the pressure in this area right from the initial steps in the field and continued to do so. We take the pressure every month.

Q. Have you taken the pressure of any well in this immediate area?

A. Yes.

Q. What well is that?

A. Fuller No. 1 of the Sun Oil Company.

Q. How often do you take its pressure?

A. About every month.

Q. Have you had occasion recently to compare the pressure taken in August 1937 with the pressure taken July 1938?

Mr. Pollard:

Just a minute—

Mr. Copeland:

Is that top or bottom pressure?

A. Bottom hole pressure.

Mr. Pollard:

We object to that unless it was taken in each instance by this witness while he was personally present and saw it. Otherwise it would be the purest hearsay with him and apparently he isn't testifying from matters which constitute official records of this Commission.

Q. For the purpose of qualifying him a little more, Mr. Collingwood, in the course of your employment with the Sun Oil Company have you made any bottom hole pressure tests in the East Texas field?

A. I have.

Q. Have you ever made any on the Sun's Fuller lease?

A. I have.

Q. Are you still in charge of taking bottom hole pressures for Sun Oil Company?

A. I don't personally run the bomb in the hole.

Q. Is it done under your supervision?

A. Yes. It is done under my supervision.

Mr. Pollard:

A man might be a thousand miles away and still have it done under his supervision and it would be hearsay and not binding on us and not binding on this Commission and not shown to be correct within the knowledge of this witness unless he was present.

Mr. Jeffrey:

As Mr. Pollard has aptly stated, the only thing wrong with his objection is that our Supreme Court and our Appellate Courts have held that where it is done under your supervision you are entitled to testify to it.

A. It is my response that they are correct as going into the files of our company.

Mr. Copeland:

I think he can testify.

Mr. Pollard:

We object for whatever the objection may be worth.

Q. How did that compare in August 1937 with July 1938, the bottom hole pressure on the No. 1 Fuller of the Sun?

A. In August 1937 the bottom hole pressure of the Fuller No. 1 was 1093 pounds which compares very favorably with the pressure on the same well of July 26, 1938, which was 1092, only one pound lower after 11 months. In the meantime the pressure had fluctuated along with the pressure in the rest of the field and came down and up and down again.

Q. Mr. Collingwood, I will ask the question from your previous study of the field generally and this area in particular, you are of the opinion that the sand in this immediate area is such that oil can migrate freely—

Mr. Pollard:

We object to that as he has not shown he has any knowledge of the sand conditions in this area on which to base your opinion.

Mr. Copeland:

I think he can testify to his opinion based on his statement on the pressure.

Mr. Pollard:

If it is confined solely to that, that would go to its materiality but we object to it on both the ground of its admissibility—that he cannot show from knowing the pressure of one well that he knows of the sand conditions throughout this entire area.

Mr. Copeland:

I don't believe the question had anything to do with sand conditions. He was talking about permeability and the free movement of the oil.

Mr. Pollard:

I don't think that one well would show that.

Mr. Copeland:

Go ahead.

Q. What is your answer, Mr. Collingwood?

A. The bottom hole pressures over the field reflect the reservoir conditions. As Mr. Griffin says, the core records show the information on a specific well. I am testifying to the permeability which represents the reservoir condition between wells over the field and the analysis of the pressure in this area compared with the rest of the field gives the information on the permeability in this area. It is the only way you do get any evidence of

permeability as to actual performance and actual information on pressure relations.

Mr. Pollard:

He is giving the pressure on one well and from that attempting to testify in response to counsel's question with respect to the migration of oil and related matters in this entire area and we say he has not shown any qualifications or basis for it.

Mr. Copeland:

We will let his answer stand. How does this pressure decline correspond with the balance of the field? With the decline of pressure in the balance of the field. Is it greater or less?

A. It is very even with it. The whole field is gradually declining over a large period of time and this area represents the same kind of decline as the average pressure in the field. It has a lower pressure being on the east side and the pressure is on the west side but very evenly going down in the average way compared with the rest of them.

Mr. Copeland:

Did you state awhile ago that this pressure has decline more than that and has risen more than this but that this represents those two dates?

A. The field has done the same thing.

Mr. Copeland:

Then and now?

A. Yes. Then and now. It has gone up and down with the field.

Q. Mr. Collingwood, from your study of the field generally and of this area in particular, I will ask you whether or not in your opinion there are a sufficient number of wells to get the maximum recovery.

Mr. Pollard:

He has not testified to qualifications with respect to knowledge of this particular area on which to base an opinion as to whether the wells as they now are sufficient to get the maximum recovery.

Mr. Stayton:

If that is necessary, that wouldn't allow any of Mr. Griffin's testimony to be in the record.

Mr. Pollard:

He gave the basis for all his testimony.

Mr. Copeland:

I think he can go ahead and give his opinion.

A. I consider the present wells drilled in this area are sufficient to get all the recoverable oil from the area without additional drilling.

Q. That is all.

Cross Examination of Mr. Collingwood by Mr. Pollard:

Q. On what do you base the opinion? And what per cent of recovery is it your opinion that the wells as they are now situated in this area will recover of the oil originally in place beneath those sands?

A. The ultimate recovery will depend on density and other things.

Q. In what way will it depend on the density?

A. The greater the density the less the ultimate recovery.

Q. Why do you say that and on what do you base that?

A. Because it has been demonstrated and proved by the Commission that the field as a whole is very sensitive to the rate of production and withdrawal from the field. You increase the withdrawals from the field and you in-

crease the withdrawals from any area in this field and it will have the same result and you will have less even production.

Q. What do you mean by even production?

A. Which means less ultimate production because of underground waste of reservoir energy.

Q. What do you mean by even production? What in your opinion is the maximum amount of recovery under the density of drilling now shown to exist on the Magnolia Fuller tract and the Sun Fuller tract?

A. I am talking about degrees of ultimate recovery. I don't say what it will be. Nobody knows.

Q. If we are talking about something none of us know, we can't get anywhere with it. We can't know what the result will be, but I will ask you to tell us what in your opinion and what you base it on—what will be the percentage of recovery of the oil in place originally beneath these areas with the present drilling pattern as it is existing on the Magnolia Fuller tract and the Sun Fuller tract?

Mr. Jeffrey.

We object to that question because the witness said he didn't give any per centage and it is an attempt to argue with the witness. He said he couldn't give it.

Mr. Pollard:

I didn't understand it that way.

A. The slower you withdraw oil from this area per acre the more ultimate production you will have.

Q. That isn't my question. Here is my question, Mr. Collingwood. What in your opinion will be the per cent of recovery of the oil originally in place beneath these respective tracts with the density of drilling as it now exists on the Magnolia Fuller tract and the Sun Fuller tract?

A. The less density the more ultimate recovery but I have no way of figuring it to a figure. I am talking about relatively.

Q. You are talking about something I'm not talking about. I want to know what your opinion will be as to the per cent of recovery of oil in place beneath the Magnolia Petroleum Company's Fuller tract with the wells spaced as they now exist.

A. It has already been over 100% but I am not saying what it will be ultimately because I wouldn't venture to make—

Q. You mean they have produced more than 100% of the oil in place?

A. Probably. I haven't figured it.

Q. Then there is no oil there?

A. It is full of oil.

Q. Where did that oil come from?

A. The west side of the field.

Q. That oil will continue to come from the west side as long as there is a pressure gradient from west to east?

A. At a rate depending on the density.

Q. What will be the per centage of recovery of the oil now in place under that tract with its present density?

A. I don't know. I can only give evidence as to what the ultimate recovery relatively would be under the rate of withdrawal. That is what our information on the field has demonstrated. I could answer only relatively.

Q. Why do you say there will be less ultimate recovery if there is a greater density in the field?

A. Because the pressure in the field has so shown.

Q. In what way?

A. I have already told you and if you can't understand it. I can't help it.

Q. Do you know what the number of barrels of oil was that was produced in 1934 in that field?

A. I will refer you to the Railroad Commission's records and it is so stated in each one of the wells in the

East Texas field that it has been demonstrated that the reservoir energy depends on the rate of withdrawal.

Q. I will ask you to answer my question. Do you know what the amount of production was in number of barrels from the East Texas field in 1934?

A. No, I don't, without some records.

Q. Do you know the number of wells drilled in that field in 1934?

A. No, not without consulting records.

Q. Do you know what the number of barrels of oil were that were produced from the East Texas field in 1935?

A. No.

Q. Do you know the number of wells which were drilled in that field during that year?

A. I have that information in my files but not here.

Q. Do you have it with you?

A. No.

Q. Do you know the number of barrels of oil produced from the East Texas field in 1936?

A. No.

Q. Do you know the number of wells producing in the East Texas field in 1936?

A. No. I don't have that with me in my mind.

Q. I will ask you that same question with respect to 1937.

A. I don't remember the exact figures. I have the figures of the Railroad Commission for this year.

Q. You weren't able to give us that information for 1937?

A. No. I can't give those figures right now.

Q. Isn't it a fact that there were more wells drilled and producing in the East Texas field in 1937 than there were in 1934?

A. Yes, there certainly were.

Q. Isn't it true that the density of drilling in the field increased every year from the beginning of the field on down to the present time?

A. Yes.

Q. Isn't it true that per million barrels of oil produced each year from this field that the pressure decline has been less as the number of wells drilled in the field has increased?

A. That isn't the reason for it.

Q. I just asked if that isn't true.

A. Its truth may be a coincidence—

Q. Is that or not true?

Mr. Jeffrey:

Let the witness explain it.

Mr. Pollard:

I am willing for him to qualify it but I want him to answer it.

A. They are not interrelated. It is two separate truths.

Q Is it or not true that the decline in pressure has been greater as the number of wells drilled in the field has increased?

A. At times it has been greater and at times it has been less. It depends on the withdrawals.

Q. Comparing the decline in pressure per million barrels of oil produced in 1933 and 1934 with the decline in pressure per million barrels of oil produced in 1937, isn't it true that that decline in pressure has lessened as the number of wells have been increased when you compare it per million barrels of oil produced from the field?

A. I have never made such a study because they are not related things.

Q. The withdrawal proposition for the utilization of pressure is a matter with respect to the potentials or the

amount of daily withdrawals from the field as a whole, isn't that true?

A. The pressure and production from the field as a whole are related, yes.

Q. And the pressure build-up or decline with respect to the daily withdrawal from the field as a whole is one and the same so far as the control of the rise or lowering of the pressure is concerned, isn't that true?

A. I didn't understand the question.

Q. I will state it this way. The pressure decline or increase is governed by and controlled by the number of barrels of oil or the volume of oil permitted to be withdrawn from the field on any given day as a whole?

A. There is a direct relation between the daily withdrawals of fluid from the field and the drop in the pressure per unit of production.

Q. Then the spacing of wells has nothing to do with that pressure decline save as it might or might not increase the daily withdrawals of oil from the field as a whole; isn't that true?

A. The spacing of wells?

Q. And increased density.

A. That is a different thing. Which do you mean?

Q. I mean them both.

A. You take the field and increase the density under the same method of production?

Q. Yes.

A. You mean you will increase the withdrawals from the field then?

Q. No.

A. Then how do you do it?

Q. You have the same top allowable from the field and increase the number of wells in the field but still maintain the same top allowable and you will still have the same ratio in pressure, will you not?

A. I don't know. We haven't had that in the East Texas field. Not since the marginal well law has the effect it has.

Q. Since the beginning of the field the density of drilling in the field has increased, hasn't it, because of the drilling of an increased number of wells each year?

A. Yes.

Q. The top allowable or production daily from the field has varied from time to time, hasn't it?

A. Yes.

Q. The ratio of the pressure has been with respect to the top allowable of the field and not with respect to the number of wells drilled in the field, hasn't it?

A. The proportional decline of pressure per unit of production do you mean?

Q. I think my question speaks for itself, Mr. Collingwood.

A. Your wording is ambiguous.

Q. If you can give me that answer, I will appreciate it. I want you to be a little more specific.

Mr. Jeffrey:

He asked for a specific question.

A. Repeat the question and I will try to word the answer differently.

Q. The maintenance of the pressure can be and has been accomplished by means of limiting the top allowable withdrawal daily from the East Texas field, hasn't it?

A. Yes.

Q. Then if that top allowable is maintained so as to maintain your pressure so that there will be only a normal decline, the drilling of additional wells would not affect the pressure, would it?

A. There would still be a little tendency to lower the ultimate production of the field.

Q. Why?

A. Because you are increasing the number of points at the bottom of the wells where the pressure is locally lowered and any increase of the amount necessary to produce in the field will cause loss of oil where the pressure is locally lowered; it doesn't do too much but does do some harm to the reservoir as gas is hastened out of solution and it increases the viscosity.

Q. Under that answer there would not be any increase per million barrels of oil produced, would there?

A. Well, you wouldn't catch it from day to day and from month to month but the over-all picture would have a greater decline in pressure.

Q. Where do you mean, the over-all picture, if you don't balance it from day to day or month to month?

A. It will be there.

Q. You balance it with an invisible balance and write with invisible ink and it is there?

A. Over a long period of time you could produce the East Texas field under one condition and then produce it under another condition and it would then be evident.

Q. In any event, as I understand your testimony, the pressure is maintained or declines in proportion to the withdrawals from the field as a whole?

A. Yes.

Q. And if the whole amount of withdrawals is limited and controlled to the amount whereby pressure can be maintained, it is true, isn't it, that the number of outlets through which the oil is withdrawn is immaterial or its effect on the pressure is immaterial but it is the total withdrawal?

A. Subject to the permeability and porosity of the sand which determines the drainage of fluid to the wells.

Q. Then if you spread that drainage in a more uniform manner you spread the uniform conditions and the uniformity of pressure throughout the field which is the ideal situation you are seeking for.

A. You drill on uniform spacing and have uniform withdrawals to get optimum conditions.

Q. That is all.

Mr. Jeffrey:

I have no further questions.

Mr. Stayton:

The Atlantic adopts all the protests made.

Mr. Pollard:

I want to point this out with respect to our contentions in reply to their three legal matters, Mr. Examiner. That is with respect to the pendency of the suit as concerns the first Hammond permit. We point out first that that permit has long since been abandoned and does not exist. Second, that the Commission's files and our evidence here disclose that there has been a material change in the conditions with respect to the well drilling pattern throughout this area whereby under the New Process case, the Commission has jurisdiction to determine the necessity of these applications for the prevention of waste and the prevention of confiscation of property. Likewise with respect to the judgment in the case of Magnolia et al vs. Mamie S. Hammond and the Railroad Commission we point out that the Commission's records disclose and the records introduced disclose that the conditions with respect to drilling in this area have changed through the drilling of numerous other wells on the Sun and Magnolia tracts since the delivery of the judgment in the Hammonds case since the Commission has the jurisdiction to determine the necessity of the wells here applied for as necessary to prevent waste and prevent confiscation of property. We have previously mentioned before and again reiterate our position with respect to the pressure decline since the Cammack application. We say that under the authority

of the New Process case by the Supreme Court the Commission in its order denying that well cannot constitute res adjudicata by that hearing and now have jurisdiction to pass on these present applications as respects their necessity for the prevention of physical waste and to prevent confiscation of property which we again emphasize as we believe the evidence has shown that we seek these wells to prevent physical waste of oil and gas through the recovery of oil and gas from large areas where it is not and will not be an efficient drainage by virtue of the wells now drilled in the absence of our wells applied for but if these four wells are granted in those areas, large amounts of oil will be produced and recovered which otherwise would not be produced and recovered which affords an ample basis for the granting of each of these four applications both as being necessary to prevent physical waste of oil and gas and for the prevention of confiscation of property.

Mr. Copeland:
Anything further? Case submitted.

The State of Texas,
County of Travis.

I, Louise Kirk, an employee of the Oil & Gas Division of the Railroad Commission of Texas, do hereby certify that the above and foregoing is a true and correct transcript of my notes made at the hearing held in Austin, Texas, at 2:00 P. M., August 15th, 1938, covering the application of G. E. Burford for special permit to drill wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33 acre tract in the D. Sanchez Survey, Gregg County, Texas, to the best of my skill and ability.

Witness My Hand on this the 22nd day of April, A. D. 1939.

(Signed) LOUISE KIRK.

Subscribed And Sworn To before me, a Notary Public in and for Travis County, Texas, on this the 22nd day of April, A. D. 1939.

(Signed) ROSE MODRALL,
Notary Public in and for
Travis Co., Texas.

(Seal)

316 PLAINTIFFS' EXHIBIT No. 19.

Railroad Commission of Texas

Oil and Gas Division

Case No. 26,868, Rule 37.

In Re: Application of G. E. Burford for Special Permit to Drill Wells Nos. 1, 2, 3, 4, on the W. L. Fuller 2.33 Acre Tract in the D. Sanchez Survey, Gregg County, Texas.

Rehearing Held in Austin, Texas, State Capitol January 31st, 1939, 9:30 A. M.

Before: Stanford Payne, Chief Deputy Supervisor, J. D. Copeland Jr., Examiner.

Record prepared by: Louise Kirk, Oil & Gas Division, Railroad Commission, Austin, Texas.

Appearances:
Gordon Griffin,
Austin, Texas,
Representing: G. E. Burford, Applicant.

J. B. Robertson,
Austin, Texas,
Representing: Magnolia Petroleum Co., Protestants.

Ireland Graves,
Austin, Texas,
Representing: The Atlantic Refining Co., Protestants.

C. B. Jeffrey,
Austin, Texas,
D. M. Collingwood,
Dallas, Texas,
Representing: Sun Oil Co., Protestants.

Mr. Jeffrey:

I have a preliminary objection to urge, Mr. Examiner. We object to the proceedings in this hearing because in Case 53915 there is now pending in the District Court of Travis County a suit attacking the permit granted to Mamie Hammonds on this same strip. Said suit is now pending in such Court and since the judicial branch of the Government has jurisdiction over the right to drill or develop this strip we submit that the administrative body, the Railroad Commission, is without jurisdiction and call your attention to the fact that in this same file No. 26,868 the statement of Mr. George H. Templin, Clerk of the District Court of Travis County, advises that such suit styled Sun Oil Company vs. Railroad Commission et al is still pending and not disposed of by final judgment and is pending on the docket of the 98th District Court. That was a letter secured for the last hearing and if you would like an additional letter stating that it has not been dismissed—from my own personal knowledge I know we have not dismissed it—We would be glad to furnish that information to you. I will state all my objections so that you

can rule on all the preliminary objections at the same time. We would further object to the consideration of these applications for the reason that in Cause No. 54769 in the case styled Magnolia Petroleum Company et al vs. Mamie Hammonds, a final judgment permanently enjoining the drilling of a well on this same strip has been entered and that judgment has now become final. We therefore insist that such judgment is res adjudicata.

Mr. Graves:
That is in what Court?

Mr. Jeffrey:
In the 53rd District Court.

Mr. Robertson:
Magnolia Petroleum Company adopts that protest or plea in abatement.

Mr. Graves:
The Atlantic Refining Company also adopts it.

Mr. Robertson:
I would like to add to the protest with regard to the final judgment enjoining the operation or drilling of the well in question that it is my understanding and we contend that there has been no change in conditions in this area which would justify the Railroad Commission or the Courts in setting aside this injunction or proceeding otherwise than in compliance with it.

Mr. Griffin:
It is the applicant's contention that the Commission has already ruled on whether or not a rehearing is justified or whether it isn't and has taken judicial knowledge of all the facts in this case and ruled that a rehearing is proper and therefore that case is settled by the granting of the

rehearing by the Commission. Relative to the trial now pending in the District Court I would like at this time to introduce in the record the record of all prior hearings on this case. This same point was brought up in prior hearings and in each instance the Commission has overruled the consideration of the trial now pending in the District Court and that trial was pending at the time the previous hearings were had and the applicant was given permission to proceed with the hearing in view of the pending Court trial; therefore there is no condition changed from that on that account at this time than was in effect at the time of the previous hearing. The law has changed considerably since the Hammond Court trial and there have been numerous cases before the Courts and judgments have been entered that change the law from what it was at the time the original Hammonds application was applied for. I would like to have one of the lawyers familiar with the proceedings in that case to state what that case found and if they don't, I would like to enter the judgment of the Court.

Mr. Robertson:

The Supreme Court in that case held that a permanent injunction granted by the District Court restraining the drilling of a well was still operative and specifically so stated in it until conditions were changed which would justify the granting of the well; in other words that the judgment of a permanent injunction is based on the facts as they existed at the time that the injunction related to which is as of the time that the order is granted. They held therefore in effect that whenever it was shown that conditions had so changed that the well would now be justified though formerly it had not been that the Railroad Commission had the jurisdiction to determine that fact and if they found that conditions had so changed they had jurisdiction to go ahead and grant a permit in spite of the previous Court judgment.

Mr. Jeffrey:

There wasn't a question of subdivision in violation of the rule involved in that case?

Mr. Robertson:

No. It was a straight out question of whether the Commission had the right to grant the wells after the Court had canceled the permit previously granted and enjoined their operation. There was a subdivision question in the original case but they didn't go into it in the one which he is talking about. That is my understanding of the holding. I could be mistaken about it but that is the way I interpret it. It was also said in that judgment although I don't really think that the Court meant to hold it that the Railroad Commission has the exclusive jurisdiction to determine whether jurisdiction to determine whether jurisdiction had changed. That statement was made but I hardly think the Court would mean that the District Court could not—

Mr. Graves:

They meant originally.

Mr. Robertson:

I don't think that there is much question but that the Court which has granted the permanent injunction would have the right to entertain an order showing changed conditions and set aside that order. That is the rule in all injunction cases. They couldn't grant the permit but could set aside the injunction and leave the applicant free to come back to the Railroad Commission and make another application unembarrassed by the judgment. I would like to have our objection ruled on.

Mr. Copeland:

Since the Commission set the case for hearing, we will go ahead and hear the testimony on it and we will sub-

mit to them your objection to the jurisdiction of the Commission as to considering it.

Mr. Robertson:

I would like to have the question as to evidence as to changed conditions passed on as a preliminary to the consideration of the application. As I understand it, there has been no evidence offered. I take the position—I don't know whether any body joins in it—that the Railroad Commission must first in a public hearing hear evidence as to whether or not conditions have changed since the Court judgment was entered and find that there has been a change in conditions which would now justify a well before they have any jurisdiction to proceed any further because of the Court judgment which stands in the way and somebody has to find that the conditions exist which make the Court judgment inoperative before the matter can be proceeded with. I make that objection for the Magnolia.

Mr. Copeland.

We will overrule that objection.

Mr. Griffin:

This is the application of G. E. Burford to drill well No. 1, 2, 3, and 4 on the W. L. Fuller lease located in the Sanchez Survey, Gregg County, Texas. This application is sought for the following reasons: First, I would like to introduce in evidence a duplicate of the plat which is now on file with the Commission and mark this as plaintiff's Exhibit No. 1.

Mr. Copeland:

The map with the circles on it will be marked Applicant's Exhibit No. 1.

Mr. Griffin:

On this map or plat I have drawn in orange color circles with a radius of 330 feet around each well. I have drawn in green a radius of 330 feet around each of applicant's four wells and have colored in red that portion of the W. L. Fuller lease that would otherwise be further than 330 feet from any drilled, drilling or producing well and would be at a less distance than 330 feet from any producing well should the four wells of applicant be drilled. In other words, the drilling of the four wells on the applicant's property would cause that portion of the Fuller lease colored in red to be drilled to a density in conformity with Rule 37 of the Railroad Commission as set forth in the East Texas field. And it is my opinion that the drilling of these wells would recover oil which would otherwise not be recovered by any of the wells now drilled by reducing the drainage area to less than 330 feet and cause a larger per cent of the oil underneath this area to be recovered ultimately.

Mr. Robertson:

Magnolia Petroleum Company objects to that statement with regard to the recovery of more oil by drilling at closer spacing distances than 330 and 660 feet on the ground that it constitutes a collateral attack on Rule 37 which the application cannot make, having appeared before the Commission with the request that an exception to that rule be granted.

Mr. Jeffrey:

We join in the objection and ask that the statement be stricken for the reasons urged.

Mr. Griffin:

That isn't an attack on Rule 37 as that will bring the red area down to a distance to conform to Rule 37. That

red area is a distance beyond 330 feet from any drilling or producing well in that area.

Mr. Copeland:
His objection was based on your statement that the closer you get the wells the more oil you will get.

Mr. Griffin:
That is my opinion. If the Commission wants to overrule that, it's all right but it is my opinion it will recover oil which would otherwise not be recovered.

Mr. Copeland:
We will overrule the objection.

Mr. Jeffrey:
Each of the proposed locations is less than 660 feet from some other well or property?

Mr. Griffin:
Yes, sir, but it brings the distance down closer—

Mr. Copeland:
Is it closer than 660 feet?

Mr. Griffin:
Yes. I would like to offer in evidence a plat showing the area of the Fuller lease and have it marked as our Exhibit No. 2.

Mr. Copeland:
It will be received and marked applicant's Exhibit No. 2.

Mr. Griffin:
I have now taken an area around and adjacent to the Fuller tract, and 8 times area around the entire Fuller

102 acres tract. East of the Fuller tract it is dry. It is on the eastern limits of the field and therefore I cut out the three eastern areas, leaving six areas to be used for density comparison. The 8 times area of the Fuller Tract would have a density of 1 well to 6.1 acres whereas the density of the Fuller tract at this time is 7.7, and the requested density is 6.0 acres as compared to the eight times area of 6.1.

Mr. Copeland:
Did you use all that Fuller Tract? How many acres?

Mr. Griffin:
100 acres.

Mr. Copeland:
I thought it was 102 acres.

Mr. Griffin:
It would make only a slight difference. It is incorrect to that extent.

Mr. Copeland:
How many acres did you use in the 8 times area after cutting out that part?

Mr. Griffin:
800 minus 300 or 500 acres.

Mr. Copeland:
You used 500 acres?

Mr. Griffin:
Yes.

Mr. Copeland:
How many wells?

Mr. Griffin:

82 wells. That gives a density of 6.0 acres per well. I would like to introduce that statement in evidence.

Mr. Copeland:

It will be applicant's Exhibit No. 3.

Mr. Griffin:

It is also the applicant's contention that the sand conditions in this area are not the same as at this time by the Engineering Department's work in checking the area they have found that the Sun Oil Company No. 5 Fuller is a pumping well. That is located 277 feet west of the west line of applicant's property. Likewise they have found that the Magnolia Petroleum Company's wells Nos. 1 and 3 on their lease are pumping wells, showing— and that the remaining wells on the tract are flowing wells, showing that there are flowing wells and pumping wells and that the said conditions are not the same in the area. That is all.

Mr. Graves:

Let me ask a question about this density statement. I understand that you took an area 8 times the area of the Fuller tract but that you took it all to the west and none of it to the east?

Mr. Griffin:

That is right.

Mr. Graves:

If you had taken an area 8 times the area of this tract, what would have been the extreme distance of that area from the strip? What would have been the distance of the outer margin of that area from the strip? How far would it have been if you had taken that 8 times area all the way around?

Mr. Griffin:

It would have been—

Mr. Graves:

I will ask it this way. Is this line the same distance from this strip that it would have been if you had taken the entire area all around instead of all on one side of it?

Mr. Griffin:

Yes, it would have been. The distance to the east line of the 8 times area would have been the same distance from the east line of the strip as the west line of the red area is to the west line of applicant's strip.

Mr. Copeland:

He took the 3 times area and then disregarded the eastern part.

Mr. Griffin:

Which is non-productive at this time.

Mr. Jeffrey:

As I understand it, you are asking for four wells on this tract, four more wells?

Mr. Griffin:

Yes.

Mr. Jeffrey:

Making a total of 17. You say that is 6 times into 100?

Mr. Griffin:

It lacks 2 acres. It is 5.99, closer to 6 than to 6.1 or 5.9. It would be 5.88, I believe, 17 times 6 is 102. I will stand corrected to that extent.

Mr. Jeffrey:
As I understand it, you offered all the testimony in the previous hearings. Let's see if I have it clear to keep from duplicating. That is what you did, offered the testimony in the previous hearings?

Mr. Griffin:
Yes.

Mr. Jeffrey:
In addition you offered first a map showing 330 foot radius and the 330 foot radii around the offset wells are colored in orange; is that right?

Mr. Griffin:
Yes.

Mr. Jeffrey:
And those are the same circles which were heretofore presented by you?

Mr. Griffin:
Yes.

Mr. Jeffrey:
You have changed the location of these four wells slightly from the previous applications?

Mr. Griffin:
I didn't change them. The applicant did.

Mr. Jeffrey:
They have been changed?

Mr. Griffin:
Yes.

Mr. Jeffrey:
Do you remember how much they have been changed?

Mr. Griffin:
No, sir, I don't.

Mr. Jeffrey:
The only difference in your Exhibit No. 1 and the former exhibit is that you drew the 330 foot radii from the new locations whereas the 330 foot radius before was with reference to the old location?

Mr. Griffin:
Yes.

Mr. Jeffrey:
They are the same radius of 330 feet?

Mr. Griffin:
Yes.

Mr. Jeffrey:
As I recall, Mr. Griffin, your testimony in the previous hearing was to the effect that if direct equidistant offsets were drilled to these locations, if all of them were granted, it would cause at least 16 offsets; is that still true?

Mr. Griffin:
Yes.

Mr. Jeffrey:
Or a total of 20 wells?

Mr. Griffin:
Yes. You are positive that is what it showed?

Mr. Jeffrey:
I just re-read my notation on it.

Mr. Robertson:
I'd like to ask a few questions.

Questions by Mr. Robertson; Answers by Mr. Griffin:

Q. Mr. Griffin, treating the entire Fuller tract consisting of approximately 102 acres as one tract and assuming that three wells are to be drilled on that tract, isn't it your opinion that those three wells should one of them be placed on the Sun Oil Company lease some little distance west of the Mamie Hammond claimed strip and another one should be put on the Magnolia Petroleum Company lease about 300 to 330 feet east of that strip? Before you answer let me ask this. Isn't it true that the distance from the well No. 6 of the Sun Oil Company to this location No. 3 is more than 660 feet?

A. Yes, sir.

Q. Therefore that will leave an area in there that is more than 660 feet, some portion of which will be more than 660 feet from any producing well from east to west?

A. No, sir. Bear in mind.

Q. I am leaving out No. 7 and No. 5 to the south. I am just considering these two wells.

A. That is right.

Q. Wouldn't it be your opinion that if two more wells are to be drilled on that tract considered as a whole, the Sun Oil Company lease and the Magnolia lease and the strip in between or the alleged strip, that one of those wells should be put on the Sun Oil Company lease approximately 330 feet west of well No. 3 or some such distance and another one on the Magnolia Lease approximately 330 feet east of the well No. 3?

A. No, sir. I will tell you why.

Q. Why?

A. The distance between the applicant's No. 3 well and well No. 7, and well No. 7 and well No. 6 on the Sun, and well No. 6 and well No. 4 on the Sun, and well No. 5 and well No. 5 on the Sun is about the same distance apart.

Q. How far is it from well No. 7 of the Sun to well No. 5 of the Sun; that is over 660 feet, isn't it?

A. Yes, but—

Q. All right. Then if you leave Sun wells 6, 7, and 5 and put your well No. 3 there you will leave some little portion in there which could--a place where that well could better be located?

A. Yes. If you would move that location 50 feet west it would tend to wipe out that little portion.

Q. That would put it off the strip?

A. Yes, but at the same time by moving it west you would likewise increase the area to the east. You would increase the strip to the east.

Q. Isn't it your opinion, assuming that two wells are going to be put on that strip that one of them should be a little bit west of the strip and another one east of the strip on the Magnolia tract?

A. I would say that would be a good idea.

Q. A better location. All right.

A. But I will say that the drilling of these wells will cause a reduction of that area.

Q. But the other locations would be better in your judgment?

A. The other locations would tend to minimize it.

Q. Isn't it true that the diagonal distance with a square 660 feet on each side from each corner to the center is approximately 462½ feet?

A. That is true of a square 330.

Q. 660 feet.

A. That is right.

Q. The diagonal distance is 462½ feet?

Mr. Jeffrey:
466 feet.

A. 466 feet, yes.
Q. Even?
A. 466.66.
Q. That is all.

Mr. Copeland:
On this density statement where you have taken in all the Fuller tract, did you secure permission from the lease owners of the other parts of the Fuller tract to use their portions of it in applying for permits?

Mr. Griffin:
No, we did not. Our contention is that if a lease is undeveloped and we have a chance to come in and develop it, we are entitled to that privilege if we apply first.

Mr. Copeland:
We will recess for about five minutes.

Mr. Jeffrey:
Mr. Collingswood has heretofore testified but it might be well to bring it up to date. Mr. Collingwood, the records show that on September 22, 1938, this application of G. E. Burford for four wells was denied. As I recall it, the well which you test monthly on that lease is the Sun No. 1 Fuller. Is that right?

Mr. Collingwood:
Yes.

Mr. Jeffrey:
The last test period after the denial of this permit in September 1938 was when? When did you next test that well?

Mr. Collingwood:
October 1, 1938.

Mr. Jeffrey:
Have you tested it monthly since that date?

Mr. Collingwood:
We have.

Mr. Jeffrey:
What is the difference in the bottom hole pressure between your last test—when was that?

Mr. Collingwood:
Jan. 1, 1939.

Mr. Jeffrey:
What is the difference in bottom hole pressure in the Sun No. 1 Fuller January 1st, 1939, as compared with October 1, 1938?

Mr. Collingwood:
Just exactly the same; 1085.

Mr. Jeffrey:
Your conclusion from the conditions of that test is the same as it was in the previous hearing?

Mr. Collingwood:
Yes. It shows a great degree of pressure maintenance and little drop in pressure.

Mr. Copeland:
In making these bottom hole tests what do you use, the bomb method?

Mr. Collingwood:
Yes, the bomb method.

Mr. Jeffrey:
You use the same type bomb the Commission does? in making your tests?

Mr. Collingwood:
That is correct.

Mr. Jeffrey:
That is all.

Questions by Mr. Griffin as follows:

Q. I would like to ask one question. Since that pressure is maintained, the same pressure, over a period of four months—it is normal for pressure to drop when oil is produced, isn't it?

A. The pressure will vary in the rate of decline according to the production from the field as a whole and if the rate of production per acre in the local area is the same as in the field as a whole, if the condition is the same as the average over the field, the pressure decline will depend on the rate of production from the field as a whole and the rate of production in the localized area.

Q. But the average field pressure is declining as oil is produced, isn't it?

A. It is subject to fluctuations and sometimes rises and sometimes falls.

Q. Normally they fall over a period of time?

A. Yes.

Q. If this pressure isn't falling and you drill additional wells and it starts falling, that would be normal, wouldn't it?

A. It wouldn't be normal if the rate of production for the local area is in excess of the rate of production from

the field as an average, the average rate of production in the field.

Q. What is the amount for the field?

A. The overall pressure in this local area has shown the same fluctuations as the field as a whole and in the aggregate over a period of four years the loss of pressure in our key well has shown less drop in pressure than the field as a whole, the average for the field.

Q. So you should drill more wells to make that drop in conformity with the field or increase the allowable for the wells?

A. Not unless the rate of production per acre is less in the local area than on the field or the average of the field.

Q. Is the rate of production per acre less or more?

A. It is about the same now. With many additional wells the production per acre would be much greater.

Q. If it is the same now and you don't have any drop you should increase either the allowable or the number of wells to make it drop in conformity with the field drops.

Mr. Jeffrey:

Do I understand your hypothesis, Mr. Griffin, to be that it is desirable to have a drop in bottom hole pressure?

Mr. Griffin:

I haven't submitted any hypothesis but just asked that question.

A. I would say that the contrary would give the best effect and the greatest production from the area; the greatest ultimate oil would be in accordance with the lowest drop in pressure.

Q. To reduce the allowable?

A. It would increase the ultimate production.

Q. To reduce the allowable would increase the ultimate production?

A. Reduce the pressure drop and it would increase the ultimate production.

Q. If it didn't have any pressure drop, how would it reduce it?

A. It has some over-all.

Q. You said over the last four or five months there hadn't been any.

A. That is right.

Q. That is all.

Mr. Jeffrey:

Mr. Collingwood, from the Questions I wasn't sure whether the Commission understood. It isn't your testimony that it is desirable to use any of the pressure in the production of oil?

A. No. The most production, the most ultimate production obtainable would be from no pressure drop.

Mr. Jeffrey:

The ideal would be to have no pressure drop?

A. That is true.

(Griffin):

If you drilled an additional well in that area, wouldn't it tend to cause or cause a pressure drop in the area?

A. I don't suppose one well would.

Q. Would four wells?

A. Possibly.

Q. Four wells in no case would cause an abnormal pressure—

A. If you are assuming that the production from this area will be stepped up in accordance with the per well allocation—

Q. Under the present Commission allowable.

A. You would tend to have a pressure drop in the area by drilling four wells. You would expect to get an increased rate of pressure drop.

Q. But you don't think that the drilling of four wells would cause a pressure drop in the area to exceed the average drop in the pressure for the entire field?

A. If the effect of 4 wells drilled on the localized area will effect the whole field, the average of the whole field?

Q. Would it effect the average drop in this area to more nearly conform to the average drop in the pressure for the entire field?

A. It would decrease the efficiency in this area.

Q. I didn't ask that. I asked if it would cause a pressure drop from that key well to be more nearly in conformity with the pressure drop for the entire field?

A. Over a period of time it would probably increase it.

Q. I mean over—say that the wells were drilled in October when you had the pressure drop and were producing at that time—

A. I couldn't say what might have happened under those changed conditions.

Q. That is all.

Mr. Copeland:

Any more questions from Mr. Collingwood?

Questions by Mr. Robertson as follows:

Q In your opinion, treating the Sun Oil Company's 50 acre lease and the Magnolia Petroleum Company's 50 acre lease and the applicant's alleged strip as one body of land, assuming that three wells were to be granted thereon, is it or not your opinion that one of them should be granted west of the strip, the alleged strip, and between the Sun No. 7 and No. 5 and one or possibly two should be granted east of the strip between Magnolia No. 6 and No. 5 and one possibly east of the strip and some point north of the Magnolia No. 6. Is that or not your opinion assuming that three or four wells are to be granted and drilled on

that entire area treated as one area without regard to any different ownerships?

A. All I can say is that I don't consider any wells necessary; that any additional wells are necessary to drain all the oil from this whole tract; but if wells were to be put down there they should naturally be put—you would select places which had the greatest average distance from the surrounding wells.

Q. And none of those locations would fall on this strip?

A. I don't suppose they would. I haven't checked up on the measurements but it looks as if they would not.

Q. That is all.

Mr. Jeffrey:

That is all.

Mr. Robertson:

As I understand it, you reiterate all the testimony you have given in the previous hearings on applications for wells on this same strip?

A. Yes.

Mr. Robertson:

Without having it repeated at this time.

Mr. Graves:

I understand that is all in the record.

Mr. Griffin:

Yes.

Mr. Robertson:

I just wanted to know if he still stood by his former testimony. Magnolia Petroleum Company protests the granting of the wells on the ground that there is no

justification at all shown for an exception and further says that it strenuously objects to the alleged owner of this strip using its lease as a justification for drilling wells on somebody's else's land if they own any land and further say that they do not concede on behalf of Magnolia that the applicant owns any title whatever in this strip because the question as to whether the 50 acre subdivision on the east and the 100 acre subdivision on the west would leave any strip between them would depend on a survey made under the field notes of the entire tract. It may be that the fences around this supposed 100 acre tract actually included 102 acres but the field notes did not and therefore we do not make any concession that the applicant has any title whatever but simply contend that there is no basis for the granting of an exception to drill any of these wells.

Mr. Jeffrey:

We urge, Mr. Examiner, as a reason for denying these locations the reasons heretofore urged in the previous applications and also at the outset of this hearing and would call your attention to the fact that from the best information obtainable there has been no change in the reservoir conditions in this area since the Commission last denied these locations, while if there has been a slight change as this witness testified there has been a drop in pressure, it is to be expected over-all and there has been no change in the last four months. We call your particular attention to that fact as an additional reason why the action of the Commission in denying the Cammack application and the Buford application previously heard should be continued and that these locations should be again denied.

Mr. Griffin:

Applicant would like to say that the changed conditions for one thing would be that normally you would expect a drop in pressure within the area and since the last ap-

plication was heard up to the present time there has been not a pound drop in pressure from the testimony of their own engineer that certainly constitutes a changed condition and an abnormal condition in that area.

Mr. Jeffrey:
We say that it is a healthy condition.

Mr. Griffin:
I say it is a changed condition.

Mr. Graves:
The Atlantic Refining Company joins in the protest and adopts the objections made by the Magnolia Petroleum Company and the Sun Oil Company.

Mr. Copeland:
Anything further for the record? Case submitted.

The State of Texas,
County of Travis.

I, Louise Kirk, an employee of the Oil & Gas Division of the Railroad Commission of Texas, do hereby certify that the above and foregoing is a true and correct transcript of my notes made at the hearing held at 9:30 A. M., January 31st, 1939, on the application of G. E. Burford for special permit to drill wells Nos. 1, 2, 3 and 4 on the W. L. Fuller 2.33 acre tract in the D. Sanchez Survey, Gregg County, Texas, to the best of my skill and ability.

Witness my hand on this the 21st day of April, A. D. 1939.

(Signed) LOUISE KIRK.

Subscribed and Sworn to before me, a Notary Public in and for Travis County, Texas, on this the 21st day of April, A. D. 1939.

(Signed) ROSE MODRALL,
Notary Public in and for
Travis Co., Texas.

340 PLAINTIFFS' EXHIBIT No. 20.

Railroad Commission of Texas,
Oil & Gas Division.

In Re: Application of G. E. Burford for Special Permit to Drill Wells Nos. 1 to 4 inclusive on the W. L. Fuller 2.33 Acre Tract in the D. Sanchez Survey, Gregg County, Texas.

Case No. 26,868, Rule 37.

Rehearing Held in Austin, Texas, State Capitol, May 19th, 1939, at 10:00 A. M.

Before: J. D. Copeland, Jr., Examiner.

Record prepared by: Louise Kirk, Oil & Gas Division, Railroad Commission, Austin, Texas.

Appearances:

Gordon Griffin, Austin, Texas, Representing: G. E. Burford, Applicant.

Suzette Meyer, Greenwood, Moody & Robertson, Austin, Texas. Representing: Magnolia Petroleum Co., Protestants.

J. W. Stayton, Black, Graves & Stayton, Austin, Texas. Representing: Atlantic Refining Co., Protestants.

J. A. Rauhut, Austin, Texas; Martin Row, Dallas, Texas; A. S. Rhea, Box 907, Tyler, Texas. Representing: Sun Oil Co., Protestants.

Mr. Copeland:

We have two motions in this case, one by G. E. Burford to rehear wells Nos. 1, 3, and 4, and also one by the Sun Oil Company to rehear well No. 2. The only ground stated by the applicant on wells 1, 3, and 4—

Mr. Row:

I believe the applicant asked for a rehearing on all four of them. In his opening paragraph he requests a rehearing on all four wells numbered above, including wells 1, 2, 3, and 4.

Mr. Copeland:

In his prayer he states it is wells 1, 3, and 4.

Mr. Griffin:

We aren't requesting a rehearing on well No. 2. We didn't request one on No. 2.

Mr. Copeland:

The only thing he asks to put in the record is the decision of the Century case and that unless all the wells are granted, he wouldn't recover his fair share of the oil. That is all that he has to put in the record. The motion by the Sun Oil Company states four reasons. One of them is the jurisdiction of the Commission and another one is that they thought the case was already settled because they had a permanent injunction, and the next one was waste and the last one is the question of subdivision. That is all that we will consider this morning.

Mr. Rauhut:

Who shall proceed first? The applicant is asking for three and we are asking for cancellation of one.

Mr. Griffin:

I believe protestants' motion was filed first.

Mr. Copeland:

Applicant's motion was received April 5th and protestants' motion was received April 6th.

Mr. Griffin:

I think it would be in line for them to put on their evidence to show why they wanted a rehearing on the other one.

Mr. Copeland:

What do you have to present?

Mr. Griffin:

All we are asking to do is put in the decision in the Century case and they say that the wells will create waste but we have ever made any such contention.

Mr. Copeland:

You don't have anything in your motion for rehearing except the Century case aside from what you put in at the former hearing?

Mr. Griffin:

That is right. In the last hearing we put on engineering testimony and you have had legal testimony put on at the previous hearings. The protestants have never put on any engineering evidence.

Mr. Rauhut:

We have at each hearing.

Mr. Griffin:

Therefore I think if they want a rehearing to rebut the unrebutted testimony at the previous hearings, now in their opportunity to put it on because our evidence has been put in in a clear and distinct manner and there has been no evidence submitted in any hearing to rebut any of the evidence which we have submitted.

Mr. Copeland:
The only thing, the only additional thing which you have to offer is the decision in the Century case?

Mr. Griffin:
Yes.

Mr. Copeland:
Do you have any objection to him offering that?

Mr. Griffin:
That is unless they put on evidence when I would like to cross examine them.

Miss Meyer:
What do you have reference to in the Century case.

Mr. Griffin:
The whole thing.

Miss Meyer:
Holding what?

Mr. Griffin:
Whatever it holds. I think that the decision will speak for itself.

Miss Meyer:
Mr. Examiner, I think that the applicant should state what it is he is basing this on. I am not familiar with just what phase of the case he is basing it on. He just says the Century case. I think he should be more explicit.

Mr. Copeland:
Is there more than one Century case?

Mr. Griffin:
Just one.

Mr. Rauhut:
I guess he has reference to the opinion of the majority of the Court of Civil Appeals in the Century case.

Mr. Copeland:
Anything you want to take up on the applicant's motion for rehearing?

Mr. Rauhut:
There are two or three questions of proof which I would like to elicit by Mr. Gordon Griffin who has testified before the Commission on additional points which pertain to our motion for rehearing.

Mr. Copeland:
Your motion or his motion?

Mr. Rauhut:
Both of them.

Mr. Copeland:
What part of his motion?

Mr. Rauhut:
Where he says two wells are necessary to prevent confiscation of property or that all of them are necessary for that purpose. I would like to ask a few more questions bearing on this matter.

Mr. Griffin:
All our evidence has been put in. If you want to put in any evidence to rebut anything we have, now is the time to put it in. I don't think we have to put on evidence here. Our case is already closed.

Mr. Rauhut:

He says it is necessary to prevent confiscation by drilling these wells.

Mr. Copeland:

Where does he say that?

Mr. Rauhut:

I thought you read that in his motion.

Mr. Griffin:

That isn't my motion.

Mr. Rauhut:

Whose motion is it?

Mr. Griffin:

Mr. Burford's.

Mr. Rauhut:

Didn't you prepare it?

Mr. Griffin:

No, I haven't even read it.

Mr. Rauhut:

He has introduced the former hearing in which he says it was necessary on both grounds. "And applicant alleges and stands ready to prove that unless all the wells requested are granted, he will not be able to recover his fair share of the oil underlying the area in question." May I question him on that?

Mr. Copeland:

Not unless he introduces something else which wasn't introduced at the prior hearing. You can cross examine him on the Century case if you want to.

Mr. Rauhut:

Mr. Griffin, I don't know what you have reference to—do you want to swear the witness?

Mr. Copeland:

He hasn't offered himself as a witness.

Mr. Rauhut:

I want to cross examine him on that.

Mr. Copeland:

Mr. Griffin, do you have the Century decision with you?

Mr. Griffin:

No, but it is before the Commission. I feel that the Commission has knowledge of the Century case but I can get a copy of it if you want it.

Mr. Copeland:

I think we would have to have a copy before you can testify about it.

Mr. Griffin:

I can't testify to it because I'm not a lawyer.

Mr. Rauhut:

You don't know what is in it?

Mr. Griffin:

Yes, I know what is in it?

Mr. Rauhut:

Shall we consider that out of evidence or in evidence?

Mr. Copeland:

I think he can put a copy of it in the record. His opinion about it makes no difference. As far as I am concerned, I am through with his motion.

Mr. Rauhut:

Mr. Examiner, at the prior hearing Mr. Griffin offered some testimony under which he sought to justify the drilling of four wells on a density basis and he repeats in his motion that they proved at the hearing that they were entitled to all these wells and Mr. Griffin testified under oath in the Turn-bow at least once and I want this admitted or testified by him and made part of the record or else I will introduce the record itself—Mr. Griffin testified in the Turnbow case that density of drilling doesn't have anything more to do with the opportunity of a tract to get its fair share of the oil than the number of fence posts around it.

Mr. Copeland:

You say he mentions that in this motion for rehearing?

Mr. Rauhut:

No. That was in his testimony in the Turnbow hearing before this Commission.

Mr. Copeland:

Were you present?

Mr. Rauhut:

Yes. I also want to ask him if that was what he testified and make it a part of this record.

Mr. Griffin:

That is an entirely different case.

Mr. Rauhut:

If we can agree that it is his testimony, we desire to offer it at this time as his testimony. Even though it be excluded, I would like our exception.

Mr. Copeland:

Are you still on the motion of the applicant? When you get through with his motion, you can offer whatever you asked for a rehearing on.

Mr. Rauhut:

He is asking for three wells and we are asking in ours to cancel one. We are opposing his and in favor of ours.

Mr. Copeland:

We will take up only new testimony and not re-hash the former hearing. Anything not covered in that motion will not be considered. Whatever he testified and you cross-examined him on in a former hearing of this case is a part of this case but we will not rehash it. The only thing he offered new is the opinion that he has mentioned in that case. Whether it is material or not, I don't know. And the same thing applies to your motion. We will not consider anything that you did not put in that motion.

Mr. Rauhut:

That goes to both motions and I would like to offer it and if the Commission doesn't agree, then they can exclude it.

Mr. Copeland:

I am ruling on it.

Miss Meyer:

Mr. Examiner, if he is basing it on the Century case these matters are in the Century case.

Mr. Copeland:

We will not discuss the reasons back of the Century case.

Miss Meyer:
All you are going to consider is a copy of the opinion in the Century case?

Mr. Copeland:
Yes. That is all that he has offered.

Miss Meyer:
Has he put in a copy of that opinion?

Mr. Copeland:
No, but he can furnish a copy of it.

Miss Meyer:
This is the hearing and he doesn't have a copy.

Mr. Copeland:
If you don't want it in, we will rule it out.

Miss Meyer:
He says he is basing it on that.

Mr. Copeland:
Everything which you refer to in any decisions, if you don't have copies we will rule that out too.

Miss Meyer:
You say you will have the hearing limited especially to the Century case?

Mr. Copeland:
What is called for in these motions.

Miss Meyer:
What do you say is called for in the motions?

Mr. Copeland:

Of course, we have already the evidence introduced at the former hearings which we will not take up at this time as we already have it and everybody had a chance to be present at that time. The only new thing which he has is the decision in the Century case.

Miss Meyer:

And he doesn't have that.

Mr. Copeland:

If you want to exclude that, I will make the same ruling with him that I will make with you; we will not let him put it in if he doesn't have it and we will not let you put in anything you don't have here today.

Miss Meyer:

Are you going to base it merely on a copy of that opinion or on the principles of law that are discussed in that opinion and what that opinion was based on or merely admit a copy of that opinion?

Mr. Copeland:

We will take that case under consideration after we hear the application and whatever is in it we will base our opinion on. We will not try the Century case.

Miss Meyer:

The points which Mr. Rauhut is bringing out are points developed in the Century case—

Mr. Copeland:

If you have any other cases you want to submit, we will be glad to have you submit them if you think they are material.

Mr. Rauhut:

It is all right with us for Mr. Griffin to furnish a copy of the opinion in the Century case later. We may want to furnish something later too.

Mr. Copeland:

We will take up the Sun's motion now. I think we can save a lot of time by taking it up point by point.

Mr. Rauhut:

What we offer we ask that it be considered not only a part of the motion but against the applicant's motion and will not designate as we offer them.

Mr. Copeland:

Let's take up the point as to jurisdiction and the case which has already been tried.

Miss Meyer:

The Magnolia Petroleum Company makes the same request and at this time adopts all the other protests made. Before we leave the Century case I would like to ask permission to file a specific excerpt from the Century case in which in substance that case states that the holding in that case is based on the record made in that particular case.

Mr. Copeland:

That will be satisfactory.

Mr. Griffin:

I think they should file the whole case and let the whole case speak for itself and not file that one portion of it. It looks to me like the decision in that case will speak for itself, whatever it holds is what we want to offer and not any excerpt from it. It seems to me that if the

case in its entirety is filed with the Commission, they can take judicial knowledge of whatever it holds.

Mr. Rauhut:

Mr. Examiner, we desire to offer in evidence first a certified copy of the Court's opinion contained in Rule 37 file on this matter dated January 31, 1935, cause 54769, Magnolia Petroleum Company et al vs. Railroad Commission of Texas et al in the 53rd District Court, that judgment being in a consolidated case reciting that cause 54,743 in the same Court styled Sun Oil Company vs. Railroad Commission et al was consolidated with this Magnolia case for trial. In connection with that judgment and as showing the issues involved—

Mr. Griffin:

Wasn't that case filed with the Commission at the previous hearing?

Mr. Rauhut:

The judgment was.

Mr. Griffin:

Then I don't see why—

Mr. Rauhut:

They got leave to furnish copies of the pleadings but I don't believe they have been furnished. I want to reintroduce them and furnish them.

Mr. Griffin:

If they were introduced one time, I don't see any use in reintroducing them.

Mr. Rauhut:

We will get along quicker by just reintroducing them as I don't find the particular pleadings I have reference to in

the file. As showing the issues involved in that case in which that judgment was entered, we offer in evidence and ask leave to furnish the Commission a copy of the first amended original petition of the Magnolia Petroleum Company in the Magnolia case and the first amended original petition of the Sum Oil Company in Cause 54,743 which was consolidated with Cause 54,769 and tried as such. We next offer in evidence the plaintiff's original petition in Cause 53,915, Sun Oil Company vs. Railroad Commission et al, 53rd District Court, together with the certificate that is in the Commission's file already from George H. Templin, District Clerk of Travis County, to the effect that the suit is still pending as of the date of the certificate. We desire leave to furnish the Commission a copy of that petition. The case is still pending and set for trial in July of this year. I represent the plaintiff in the case and therefore I am prepared to make that statement. In our motion for rehearing we allege that this strip is a voluntary subdivision. We don't find that the title papers are in the Commission's record on this case. If they are in there, we have failed to see them. We therefore desire to offer in evidence and furnish the Commission with copies of each, first the original lease from W. L. Fuller and wife to J. A. Reynolds dated July 31, 1930, recorded in Volume 4, Page 1, of the Deed Records of Gregg County, and also the assignment from J. A. Reynolds to Mamie Hammonds covering that Fuller 100 acres more or less, dated September 15, 1930, recorded in Volume 60, Page 115, Gregg County Deed Records. Next the assignment dated December 18, 1930, from Mamie S. Hammonds joined by her husband O. O. Hammonds to Claude Bell and R. A. Gaddy conveying the leasehold estate in the east 50 acres of the Fuller 100 acres more or less. Next the assignment of the oil and gas lease dated February 28, 1931, recorded in Volume 75, Page 86, Deed Records of Gregg County, from Mamie S. Hammonds

joined by her husband to Sun Oil Company covering the west 50 acres of the above described 100 acre Fuller tract, more or less. We do not admit that the applicant has title to this strip, it being our contention that the purpose of the sale was to sell the entire interest of Mamie Hammonds in that tract by east and west halves. I would like to say that the existence of the strip has never been adjudicated in any Court as between Sun Oil Company and the other parties.

Mr. Copeland:
Do you claim title to it?

Mr. Rauhut:
The title is asserted in the case pending in the District Court, Cause No. 53915, the original petition in which has been introduced.

Mr. Copeland:
Has there been any lawsuits over the land?

Mr. Rauhut:
In that suit we prayed "that plaintiffs have judgment decreeing said strip to be part and parcel of plaintiff's leasehold estate as assigned to it and in any event that the complained of order of the defendant Railroad Commission be in all things annulled, canceled and held to be invalid."

Mr. Copeland:
Has there been any lawsuit to litigate the title?

Mr. Rauhut:
None except this one which I quoted.

Mr. Griffin:
There has not been one tried in the County Court of Gregg County?

Mr. Rauhut:
Not that I know of.

Mr. Griffin:
That is where it would be tried if it was a dispute as to title to the land.

Mr. Rauhut:
Unless it is tried here.

Mr. Row:
It wouldn't be the County Court in Gregg County.

Mr. Griffin:
I mean in the District Court.

Mr. Rauhut:
We put the question over here.

Mr. Griffin:
If it is a dispute of title, would it be tried here?

Mr. Rauhut:
This District Court would have jurisdiction to try it. It would be a question of venue and the case was filed without a plea of privilege by the defendants to be sued in Gregg County and that issue is involved in this case in Travis County which is set for trial. Mr. Grffiin, are the assignments whereby Burford seeks to establish title in himself to this strip of record? I haven't seen them and they have not been introduced.

Mr. Griffin:

I believe there is a brief filed in the previous hearing by the attorney showing the ownership in the strip.

Mr. Rauhut:

Have the assignments been filed here?

Mr. Griffin:

That I don't know. The record will have to speak for itself on that.

Mr. Rauhut:

Do you know whether the applicant claims under Mamie Hammonds? I understand that they do. I understand the applicant claims to hold under assignment from Schroeder who in turn had an assignment from Mamie Hammonds on that strip,

Mr. Griffin:

I believe he does have an assignment from Mamie Hammonds and also one from Fuller.

Mr. Rauhut:

The original Fuller lease clearly covered this land. There is no question about that. That lease is in full force and effect and I take it there is no dispute from any source about that.

Mr. Griffin:

Does the Commission have jurisdiction over ownership of land, Mr. Rauhut, to determine it?

Mr. Rauhut:

You have been quoting the law to us.

Mr. Griffin:

I am asking if they have jurisdiction to decide title.

Mr. Rauhut:

I don't think they have jurisdiction to decide title but they should not be granting permits there unless and until Burford establishes title to it. I would like leave at this time to introduce and furnish the Commission with a copy of the chain of assignments from Mamie Hammonds into G. E. Burford. We next desire to offer in evidence—

Mr. Copeland:

Do you claim that he doesn't have title, that Burford doesn't have title?

Mr. Rauhut:

Yes. We claim when we undertook to buy this we undertook to buy all the interest which Mamie Hammonds had.

Mr. Copeland:

Is that stated in the motion for rehearing?

Mr. Rauhut:

We refer to the suit in the first paragraph wherein that question is raised. We say if the strip exists, it is through a subdivision by leasing transactions.

Mr. Copeland:

I believe we don't need to go into that any further.

Mr. Rauhut:

We next desire to offer in evidence in support of the motion for rehearing all the testimony offered by the Sun Oil Company in the prior hearings on the G. E. Burford application to drill these well locations. I believe that is contained in Rule 37 Case 26,868 and there have been two hearings and at one of those hearings—the last hearing incorporated all the evidence adduced at the first

hearing and at the first hearing Sun Oil Company offered in evidence all the testimony offered by it at the hearing on the application of Cecil Cammack to drill wells on this same strip and therefore we consider that to be part of the evidence which we are now reoffering. We contend that if this strip is there as stated it is a subdivision and disregarding that last subdivision and considering the strip as part of the 52.33 acres or the 52.33 acre entire tract, that the drilling of the No. 2 well is not necessary and we contend that the drilling of none of these wells is necessary to protect this entire tract from drainage, and there has been no testimony showing that. But in that connection we desire to ask Mr. Griffin a few questions by way of further cross examination on that point in support of our prayer in the motion for rehearing, in paragraph 4 of that motion.

Mr. Copeland:
I believe we have already gone into that.

Mr. Rauhut:
We think it is undisputed—

Mr. Copeland:
Do you have your own witness present?

Mr. Rauhut:
Yes. We will put him on and show it by him also.

Mr. Copeland:
You have already cross examined Mr. Griffin.

Mr. Rauhut:
I would like to ask a few more questions on it.

Mr Copeland:
We will not go into that. But if you want to put your witness on, that is all right.

Mr. Rauhut:

This is a new point not covered by the record. He introduced a density statement and we propose to show by him that he doesn't consider that density has anything to do with the matter and he so testified before the Commission.

Mr. Copeland:

Did you mention that in your motion for rehearing?

Mr. Rauhut:

We didn't set out all our evidence. But we say that there is no necessity for the drilling of this well at the location granted in order to protect such 52.33 acres and I want to prove that.

Mr. Copeland:

You state that the undisputed evidence shows that already. Why re-hash it?

Mr. Rauhut:

If the first sentence is true and the second one should be considered by the Commission untrue, wouldn't we be entitled to prove that second one? It says when so considered there is no necessity for drilling the well to protect the 52.33 acre tract from the drainage by the adjoining properties. That is what we want to prove.

Mr. Copeland:

Put your own witness on. Mr. Griffin isn't a witness.

Mr. Rauhut:

He is a witness here.

Mr. Copeland:

He hasn't offered himself as a witness.

Mr. Griffin:

They have their own witness here and they have asked for the rehearing to rebut the evidence in the record. Let them put on their own engineer and rebut it.

Mr. Rauhut:

Mr. Griffin says these wells are necessary and I want to examine him under oath on that very point which we have alleged in Paragraph 4.

Mr. Griffin:

Do you have an engineer here?

Mr. Rauhut:

Yes.

Mr. Griffin:

Why don't you prove it by him?

Mr. Rauhut:

I want to prove it by you too.

Mr. Griffin:

I am not offering myself as a witness.

Mr. Rauhut:

Mr. Examiner, I ask that he be sworn and required to testify under the statute which authorizes the Commission to require witnesses to testify.

Mr. Copeland:

We will not require him to testify.

Mr. Rauhut:

Then I desire to offer in evidence the testimony of Mr. Gordon Griffin in the last hearing on the Turnbow application to drill two wells on 2½ acres of the McGrede

tract in the Sanchez Survey, Gregg County, Texas, being the same survey that this land is out of and which testimony was adduced before the Commission and is a part of their records to the effect that density in the opinion of Mr. Gordon Griffin has no more to do with the opportunity of a tract to receive its fair share of the oil than the number of fence posts which go around it. I will mark for the reporter and get the transcript after this hearing and mark for the reporter the exact page which I want to introduce as being his testimony and as being offered by him on that point.

Mr. Griffin:

If he offers that, I want to offer the transcript in every case I have ever testified in before the Commission.

Mr. Rauhut:

If you want to produce them and put them in the record like I am going to do, that is all right.

Mr. Griffin:

I offer them in evidence as the Commission heard each of them, the record of all the evidence I have ever testified to before the Railroad Commission and showing that the individual cases would probably justify—

Mr. Copeland:

I think all that is immaterial.

Mr. Rauhut:

I make that offer. May I mark it and have the reporter copy it here or we will get that transcript now and find it and read it.

Mr. Copeland:

I think it is immaterial to this case unless you can show some connection between the two tracts of land.

Mr. Rauhut:

We feel that we have shown that already by the testimony that we have just offered. And his further testimony in the same record that what a tract has to have to get its fair share of the oil and what it needs is equidistant offsets. The location here involved are not such.

Mr. Copeland:

Can't you prove that by your witness?

Mr. Rauhut:

I can prove it by him. I would prefer to prove it by him.

Mr. Copeland:

His testimony was closed and cross examination of him closed at the former hearing.

Mr. Rauhut:

I am not cross examining him but offering it from the Commission's records—

Mr. Copeland:

Can you show that the conditions in the Turnbow case are the same as in this case and there are the same sand conditions and they are in the same area?

Mr. Rauhut:

They are in the same survey and in the same county.

Mr. Copeland:

If you can't prove that, we will not receive it.

Mr. Rauhut:

They are in the same survey and same County but I am not undertaking to go into detail but merely introducing

the witness' testimony as to what density amounts to in rebuttal of what he has testified to before on density.

Mr. Copeland:
I don't believe it has any bearing on this case.

Mr. Rauhut:
We desire to present the excerpt and have it marked as a bill of exception.

Mr. Copeland:
We don't grant bills of exception here. The record will show what you offered.

Mr. Rauhut:
The record will not show that. I don't want to be arbitrary and ask you for something you shouldn't receive but I want to mark that particular passage.

Mr. Copeland:
You quoted no part of it in the motion for rehearing and the Commission has not agreed to accept anything except what is in the motion for rehearing. If you will confine yourself to what is in the motion, we will proceed.

Mr. Row:
I would like to ask as to the specific meaning of your ruling on Mr. Griffin's testimony. Do I understand that Mr. Griffin not only refuses to testify and not only refuses to answer Mr. Rauhut's question but that you have ruled that it is improper and that you refuse to swear him for that purpose?

Mr. Copeland:
That is correct.

Mr. Row:
That is the correct ruling?

Mr. Copeland:
Yes. That wasn't part of the motion for rehearing and we will not rehash the hearing which we have had before. If you have witnesses and want to put them on to prove something which is in your motion, very good. Confine yourself to the motion. We will go ahead and hear it but we will not consider anything not in the motion for rehearing.

Mr. Rauhut:
That is where the rub comes. I consider that the motion has things in it which you consider aren't in it.

Mr. Copeland:
If you can show it, I will be glad to be shown.

Mr. Rauhut:
As to the No. 2 location in our motion we say that it isn't necessary to prevent waste.

Mr. Copeland:
Then put on your proof to show it.

Mr. Rauhut:
And we show that has been adjudicated in paragraph 2. In paragraph 3 we say it is not now necessary to prevent waste and I would like to cross examine Mr. Griffin in proof of these matters.

Mr. Copeland:
Why use somebody else's witness when you have your own? He hasn't come here as a witness on your motion for rehearing but to cross examine any witness which you brought.

Mr. Rauhut:
He is an expert and has testified before on this matter.

Mr. Copeland:
I can't compel a witness to testify in any case and you can't compel anybody to testify in a case unless you hire them.

Mr. Rauhut:
I understood the Commission had that authority.

Mr. Copeland:
We could if we wanted him to testify for us.

Mr. Rauhut:
The Commission doesn't want to hear what his testimony would be on that any further?

Mr. Copeland:
We want you to prove what you have to prove by whatever means you have available to do it. You can't made Mr. Hudhall or Mr. Griffin or any of them come here before the Commission to testify.

Mr. Rauhut:
We will like to recess for about two minutes.

Mr. Rauhut:
I would like to introduce testimony by Mr. Rhea.

363 MR. A. S. RHEA, having first been duly sworn as a witness, under oath testified as follows:

Questions by Mr. Rauhut:
Q. State your name please.
A. A. S. Rhea.

Q. Where do you live?
A. Tyler, Texas.
Q. What is your occupation or profession?
A. Engineer with the Sun Oil Company.
Q. What kind of engineer?
A. Petroleum engineer.
Q. How long have you been engaged in that profession?

Mr. Griffin:
We will admit his qualifications.

Q. Are you acquainted with the Sun Oil Company's Fuller lease and the Magnolia's Fuller lease and what is called the strip in there?
A. Yes, sir, I am.
Q. Are you familiar with and have you made a study of that area and the producing conditions which exist there?
A. Yes, sir.
Q. How long have you been acquainted with that area?
A. Ever since the leases were drilled, some eight years ago.
Q. It is a bottom hole pressure key well on that Sun lease, isn't there?
A. Yes, sir, there is. The No. 1 well.
Q. No. 1 Fuller?
A. Yes.
Q. Is it part of your position and have you kept up with the pressure conditions there in the reservoir?
A. Yes, sir, I have.
Q. How often are the pressures tested there?
A. They are tested monthly.
Q. When was the last test made, approximately?
A. The latter part of last month, April.

Mr. Copeland:

The Commission took them?

A. The Commission runs the same key well. We run our well with our own instruments too.

Mr. Copeland:

All your wells?

A. The No. 1 well. The Commission uses the same well as a key well. That is Sun Oil Company's W. L. Fuller No. 1.

Q. What is the pressure in that last test and when was it made?

A. The last test was made in the latter part of April and while I haven't figured the formula it is 1060 pounds.

Q. How did that pressure compare with the pressure prior to the first of March?

A. The pressure had shown a decline since the first of March.

Q. On or about the first of March was there a change made in the system of production and proration by the Commission?

A. Yes, there was.

Q. What change was that?

A. Prior to April first the field had been on five days production per week and beginning with April first the one day shut-in was lifted and the field went on 6 days production.

Q. Was that in 1939?

A. Yes.

Q. What was the date of the last test?

A. The latter part of April.

Q. As long as the field was producing at a constant rate and the same number of days per week what was the behavior of the wells in this area according to the tests?

A. The drop was very slight. The pressure was maintained very well, very good, for a period of some 18

months the pressure was the same as at the beginning of the 18 months period.

Q. Wouldn't that indicate in your opinion anything with reference to the permeability and porosity of the sand in this area?

A. Yes, sir, it indicates that the permeability is fairly good and that it reflects the changes produced in the field.

Q. It reflects changes pertaining to the field?

A. Field changes.

Q. As the field pressures vary, the pressure on this well varies in proportion?

A. Yes.

Q. Do you recall what the pressure was in the beginning and at the end of that 18 months period referred to, approximately?

A. As I recall it, it was 1093 pounds at the beginning of the period and 1092 at the end of that period.

Q. Was the proration during that period on a constant level approximately?

A. Very nearly so.

Q. You say that this well pressure has fluctuated in accordance with the fluctuation of the field pressure? I asked you whether or not that indicated anything about the permeability and porosity. Did you give me an answer on that? Does it indicate anything with reference to free connection through the sand?

A. Yes, it does. It indicates that there is a connection. A free connection.

Q. It indicates free connection. Does that indicate good porosity and permeability or bad porosity and permeability?

A. I would say good.

Q. The wells on this Fuller tract—there are more wells than 1 well to 10 acres on this Fuller tract even leaving out these on the strip, aren't there?

A. Yes, sir, there is.

Q. And what is your opinion as to—If you have made any study of it, I will ask you to give me your opinion as to the relative oil content of the Fuller tract now as compared with originally, the amount originally in place under it.

A. There is practically as much oil under the Fuller tract as there was originally.

Q. Approximately how much oil per acre has been produced by the wells on the Fuller tract?

A. Approximately 50000 barrels.

Q. You represent that an exact figure or an approximation?

A. That is an approximation. I don't have the exact figures.

Q. Is there 5000 barrels, 5000 less barrels per acre now under that tract than there was originally?

A. No. There isn't.

Q. Where did that extra oil come from if you have taken out roughly 5000 barrels per acre and yet the content now isn't 5000 barrels per acre less than it was originally? Has oil come in to take the place of that withdrawn?

A. Yes. Oil has migrated to the lease.

Q. Oil has migrated to the Fuller tract?

A. Yes.

Q. From the fact that the production from this Fuller tract has not reduced the original oil content a proportionate amount or an equal amount does that indicate anything as to whether or not wells on the adjoining lands are draining oil from the Fuller tract?

A. It indicates that the wells on the adjoining tracts have not drained oil from the Fuller tract.

Q. In your opinion is there any necessity for drilling any additional wells on the Fuller tract or any part of it in order to prevent drainage to adjoining tracts?

A. There is not.

Q. Does your testimony apply equally to all parts of the Fuller tract? That is, every part has only slightly less than it had originally?

A. That is correct.

Q. I want to ask have you studied in this field and in this area and generally throughout the field the question of trying to get the greatest amount of oil recoverable from the sand?

A. Yes, I have.

Q. Is that a part of your job to determine or study and try to determine what development system or what development pattern will get the greatest recovery of oil?

A. That is correct. Yes.

Q. And whether the drilling of additional wells in particular areas would increase or decrease the ultimate recovery from the area and from the field?

A. Yes, sir.

Q. As to this Fuller tract we will first consider it as a whole 100 acre tract as I believe it is called. This area is now drilled to a greater density than 1 well to 10 acres, isn't it?

A. Yes, it is.

Q. Have you any opinion on the question of whether or not there are enough wells on that tract to produce the recoverable oil in place under it?

A. I think there are enough wells on the tract to produce the oil under the tract.

Q. In your opinion is there any necessity for drilling an additional well or wells between the Sun lease and the Magnolia lease or between the Sun wells and the Magnolia wells in order to efficiently develop and drain the area?

A. I don't think that there is any necessity for drilling there, no, sir.

Q. Do you think that the area between those wells will be efficiently drained of the recoverable oil by the wells there existing?

A. Yes, sir.

Q. If a well is drilled on this strip, a well or wells, and we are treating it as a separate tract for the purpose of this examination, would such wells drain oil from both sides of the strip?

A. It undoubtedly would.

Q. Would it drain oil from that portion of the Fuller tract lying east and west of it?

A. Yes, sir, it would drain oil from the adjacent tracts.

Q. If the strip exists there and is developed as a separate tract, would it be necessary in your opinion in order to lessen the drainage from that well or wells drilled on the strip from the adjacent tracts to drill offset wells on the adjoining tracts?

A. Yes, it would be to protect the interests of the leases.

Q. Each well in this area has the same allowable per day under the Commission's proration order, doesn't it?

A. Under the proration order as set out for the field, each well in the area there has the same allowable with the exception of one well on the tract which has a lesser allowable.

Q. The density or spacing of wells doesn't make any difference in the allowable?

A. No.

Q. The allowable is fixed without reference to that?

A. That is right.

Q. What would be the allowable per acre per day on the strip with one well producing 20 barrels?

A. The allowable per acre per day?

Q. Yes.

A. That is 2.4 acres and it would have an allowable of 20 barrels. The allowable then would be approximately 8 barrels per acre per day.

Q. The Magnolia lease has 50 acres and they have 6 wells?

A. Yes.

Q. What would be the allowable production per acre per day on that tract approximately? About 2-2/5 barrels roughly?

A. Approximately, yes. 120 divided by 50.

Q. Still assuming for the sake of the question that the strip is allowed to be developed as a separate tract and that a strip exists there, then there would be 50 acres over to the west, the Sun Oil Company, with 7 wells?

A. That is correct.

Q. The allowable production per acre per day on that tract would be roughly between 2 and 3 barrels a day?

A. That is right.

Q. The strip would have an allowable production per acre per day of better than three times as great as either of the adjoining tracts in that event?

A. Yes, sir, in the neighborhood of 3 times as great.

Q. Considering the strip as a part of the Sun Oil Company lease, that would be a 52.4 or 52-1/3 acre tract with 7 wells on it. The allowable production per acre per day on that entire area would be a fraction greater than the east 50 acres, wouldn't it?

A. Yes, it would be slightly greater.

Q. You say that the drilling of a well on this strip would force an offset to the east and west in order to lessen drainage from the lands to the east and west. In view of the fact that the producing well on the strip would have an allowable per acre per day roughly 3 times as large as the adjoining area or a little over 3 times as large as the adjoining area, would the drill of an offset well entirely stop drainage from the adjoining tracts by a well on the strip?

A. No, it would not.

Q. The drilling of any well anywhere on this strip would force offsets to the east and west, wouldn't it?

A. That is right.

Q. How wide does the plat attached to the application say, this strip is, Mr. Griffin?

Mr. Griffin:

45 feet, I believe. 22.3 and 22.3 would make 44.6.

Q. If the strip is 45 feet wide and wells are space on it in the center and offset equidistant, they would be about 45 feet from the well on the strip?

A. That is correct.

Q. And there would be 3 wells a total distance of about 90 feet?

A. Yes, that is correct.

Q. What in your opinion would be the effect from the standpoint of the ultimate recovery of oil—from the standpoint of getting the greatest ultimate recovery from the field if you drilled 3 wells in this area on a total of 90 feet apart. Let me ask first what effect would it have on the pressure?

A. Having the number of wells confined and the increased withdrawals from that small area it would create a local low pressure area.

Q. Would it have any effect from the standpoint of causing gas to come out of solution from the oil in this area?

A. It undoubtedly would. Yes.

Q. When the oil starts coming out of solution when the pressure declines in that area. What effect does that have on the recovery?

A. You mean when the gas comes out of solution?

Q. Yes.

A. It will reduce the recovery.

Q. What is your opinion with respect to whether the drilling of wells on the strip taking them alone or in connection with the offsets which you say would be forced as to whether that would increase or lessen the recovery from the field?

A. I believe it would, if anything, lessen the recovery from the field.

Q. Is it your opinion that—what is your opinion with respect to whether that would cause any waste of gas?

A. It would create a wastage of gas, yes.

Q. Is there any bottom water under this tract at this time? Bottom hole water?

A. I don't think so at this time.

Q. How far is it from this tract that you know of, water that you know of?

A. Water is in the neighborhood of 2/3rds of a mile away.

Q. What is your opinion as to whether or not this area—that water will come into this area and in the sand in this area during the producing life over there?

A. It seems to me that it is very likely that water might come in, that water would encroach into the sand before the wells are gone.

Q. Will the drilling of any well on this strip and its offsets—would it or not bring about even or uneven spacing pattern? What does it do?

A. The drilling of additional wells on the tract would bring about uneven spacing?

Q. Yes.

A. Yes, it would.

Q. When you drill offsets, it is more uneven?

A. That is right.

Q. Will that have any importance if and when water comes into the area during its producing life? Will that close and uneven spacing bring about uneven withdrawals of oil?

A. Yes, it will bring about an uneven flooding.

Q. That is when the water comes in. It will bring about an uneven flooding?

A. Yes.

Q. Because of the uneven encroachment of water?

A. Yes.

Q. Is that good or bad from the standpoint of recovering the oil?

A. It is bad in that some of the oil which remains in the sand will be bypassed and left in the sand as unrecovered oil.

Q. That is all.

Questions by Mr. Row:

Q. Mr. Rhea, you have testified that water has already encroached to within about 2/3rds of a mile of this property?

A. Yes.

Q. You have also testified that the recent history of the wells has shown a considerable pressure drop?

A. You mean within—what do you mean by recent?

Q. Within the last month, since the allowable has been increased, since it has been on 6 days production there has been a pressure drop in the area?

A. That is right.

Q. Your conclusion is that if any additional wells are drilled in this area, then the result would be more gas coming out of solution?

A. That is right, and a more rapid pressure drop.

Q. You anticipate that if the pressure is maintained the water will eventually deplete this entire Fuller 100 acres by the water drive; is that correct?

A. Yes.

Q. But if more wells are drilled in the area you anticipate more gas coming out of solution and a partial gas drive as distinct from the water drive?

A. Yes.

Q. What in your opinion is the relation between the gas drive in this field and the water drive in this field so far as it bears upon the amount of oil left in the ground unrecoverable?

A. Well, your water drive is much more or a much greater recovery from the sand than a gas drive.

Q. Would you say the water drive is two times as efficient as the gas drive or 3 times as efficient?

A. I would say at least 2 times as efficient.

Q. If even one more single well is drilled in this area, it will result in waste in the field by leaving larger quantities of oil in place in the field; is that correct?

A. One well, of course, will have an effect on lowering the pressure in the area.

Mr. Copeland:

What do you mean by this area?

Q. On the Fuller lease of 100 acres. In your opinion, Mr. Row, the field rate rather than the spacing of the wells is largely responsible for your ultimate recovery from the field, isn't it?

A. Yes, that is right.

Mr. Copeland:

The rate or the spacing?

Mr. Row:

The rate of flow

Mr. Copeland:

Is more important than the spacing?

A. The rate of withdrawal from the field.

Q. It is far more important than the spacing of the wells?

A. Within reasonable limits of drilling.

Mr. Rauhut:

As part of that answer do you or not take into consideration the typothesys that there will be even withdrawals from the field?

A. With the spacing fairly uniform the withdrawals would be uniform, and that is assuming that the with-

drawals from the field would be fairly uniformly distributed.

Mr. Row:

What is the relation between the pressure in the area around the W. L. Fuller 100 acre tract with the rest of the field?

A. It compares very uniformly with the field. That is, there is such a connection in permeability between the lease and the average of the field that when the field as a whole drops or increases, the same effect is noted in this area.

Mr. Row:

That indicates in your mind no irregular conditions surrounding this particular W. L. Fuller 100 acre tract which would justify any different application of principles to this particular Fuller 100 acres than to any other area of the field?

A. That is right. It is a uniform area, I would say.

Mr. Rauhut:

Do you know what the average pressure in the field is?

A. In the neighborhood of—I would have to use approximate figures—about 1085.

Questions by Mr. Rauhut:

Q. About 25 pounds higher than this pressure on the Fuller tract?

A. Yes, that is right.

Q. The source of pressure in the field is on the west side, isn't it?

A. Yes.

Q. It doesn't come in from the east side?

A. No.

Q. The source of the pressure is on the opposite side of the field, you might say?

A. That is correct.

Q. Is it a natural condition in the field that the pressure be greater on the side where the pressure is coming from than on the center or toward the east side?

A. It is natural that the pressure would be higher on the side from which it is coming. It travels from high to low.

Mr. Copeland:

That isn't true in this case, is it?

A. Yes.

Mr. Copeland:

The pressure on this was 1150?

A. 1060.

Mr. Copeland:

In the middle of the field it was 1085. Then it isn't high on the side where you would expect to find it?

A. Yes. The average of the field is 1085. That is to the west and the pressure is increasing from 1060 in this area.

Mr. Rauhut:

Going west it gets higher?

Mr. Copeland:

I thought this was on the west side.

A. This is on the east side.

Mr. Rauhut:

This is in the Schanze Survey.

A. Of course the 1085 is the average for the field going from low on the east to high on the west.

Questions by Mr. Rauhut Continued:

Q. Now, Mr. Rhea, suppose you had out there extending from the west side of the field over to the east side of the field a section running through there which had exactly the same conditions of porosity and permeability. Would it not be natural on that hypothesis for the pressure to be higher on the west side, the source of pressure than on the east side?

A. Yes, that is right.

Q Do you consider the slight difference in pressure here of 25 or 20 pounds as being—what is that due to? What is that du to? Is it due to position on the structure?

A. It is due to position on the structure, you might say, and that is necessarily a differential which must be set up for the fluid to move from west to east.

Q. Is that a normal difference then? This pressure in this area as compared to the center of the field and the west side?

A. It is normal, yes, in areas of similar location.

Q. There are some areas on the east side of the field where the pressure is very much less than this pressure, isn't there?

A. Yes.

Q. The pressure runs down to some 400 pounds in some areas, doesn't it?

A. Yes.

Q. But in this area you consider that this is a normal pressure indicating normal conditions in the sand compared with the field generally?

A. That and also more uniform spacing.

Q. In other words, the uniformity of pressure, that is, the fact that the pressures here compare favorably with the field average is due to two factors then, similarity of conditions in the sand and the uniformity of spacing which now exists on this Fuller tract?

A. That is right.

Q. Where is the average pressure of the field found relatively? Is it in the center between the east and west sides?

A. Generally speaking, yes.

Q. In your opinion is it important that the pressure on this Fuller tract be maintained as high as possible from the standpoint of getting the highest ultimate recovery of oil?

A. Yes, sir.

Q. And be allowed to decline as little as possible?

A. That is correct.

Mr. Row:

Have any sand lense conditions been found either on the east side of the field or anywhere in the field which have produced oil, indicating that the oil has been pocketed in sand lenses separate from the rest of the reservoir with no connection?

A. I don't know of any.

Mr. Row:

You think if there had been any, you would have known of it?

A. It seems that I would have heard of them.

Mr. Rauhut:

You regard all this productive area as being a common reservoir for the East Texas field?

A. Yes.

Mr. Rauhut:

That is all.

Questions by Mr. Copeland:

Q. Mr. Rhea, do you believe that the closer you space wells the more oil you will get in ultimate recovery? The more ultimate recovery you will get from the field?

A. The closer spacing of wells?

Q. The closer you space the wells the more ultimate recovery you would get from the field. Do you believe in that theory?

A. No, I do not.

Q. Do you believe in the theory of the wider spacing of wells to get more ultimate recovery?

A. I think that you will recover as much oil by wider spacing as by very close spacing.

Q. What spacing would you recommend to get the best ultimate recovery of oil from this field?

A. I don't think that—I would think that spacing 1 well to 10 acres would be sufficiently small.

Q. You think that would get the ultimate recovery?

A. Yes.

Q. And any well drilled less than that would be a useless well and tend to create waste? Would that be right?

Mr. Rauhut:

You mean where any conditions prevail or where conditions like this prevail?

A. Under controlled withdrawals where you are not taking all that you can get I think that is correct. You will recover just as much with rather wide spacing as with close spacing.

Q. But you also think that to space them regularly e n though they are at less distances than 10 acre spacing and taking them ratably you approach that ultimate recovery?

A. Well, I think that you will by having them spaced closer and taking the oil ratably—I don't believe you will recover any more oil from the sand than you will by wider spacing.

Q. I would like for you to look at this map attached to this application on which it has all the wells

drawn with circles around them with 330 foot radius, and see if they are regularly spaced on that lease?

Mr. Rauhut:
Is this on our motion for rehearing?

Mr. Copeland:
You asked about regular spacing of wells and whether it would cause close drilling of wells and I am cross examining him on that same point.

Mr. Rauhut:
Is there 10 acres in each of those circles?

Mr. Copeland:
They each have a 330 foot radius.

Mr. Rauhut:
They don't have 10 acres.

Mr. Copeland:
Mr. Rhea, how would you space wells to have a 10 acre drainage pattern?

A. Spacing 330 feet from the property line is a 10 acre pattern.

Q. That would make 660 feet apart?

A. Yes, that is correct.

Q. If you want to draw those circles larger, I would be glad for you to do that, but these are 330 foot radius. Are those wells evenly spaced?

A. It is about us uniform spacing as you will find in the field. There isn't much uniformity to the spacing anywhere.

Q. Take for example the No. 2 on the strip. Is it any closer to the adjoining wells to it than those other wells shown on that lease? Is it any closer to the adjoining wells than those wells are to each other?

A. I see no wells on the leases which appear to be closer or as close. A little closer, I believe.

Mr. Rauhut:

There are some further apart too, aren't there?

A. Yes.

Mr. Rauhut:

A lot of them further apart?

A. Yes.

Q. And quite a few of them closer?

A. I see two of them which are closer.

Q. All of them are in that same area?

A. Yes.

Q. There is another answer you gave awhile ago I want to ask about. You stated under this Fuller tract there was approximately the same amount of oil in place as when the field started; is that correct?

A. That is my opinion.

Q. Where did that additional oil come from?

A. From the neighboring leases.

Q. Do you know how much ultimate recovery a well spaced on this 2½ acre tract would get from now until the end of the field?

A. How much oil that well would recover?

Q. Yes.

A. It would depend on the life of the well and the rate of production from the well.

Q. Would it recover as much oil from now on during the rest of the remaining life of the Fuller lease has recovered from some other leases already?

A. I didn't follow that question.

Q. Will the Fuller well if drilled recover as much oil from now on during the remaining life of the field as the Fuller lease has recovered from the adjoining leases up to now?

Mr. Rauhut:

I don't believe I understood that question either.

Q. He says it has produced oil for the past 5 or 6 years and has just as much oil under it now as when it started.

A. Slightly less.

Q. Will this well produce as much oil as this Fuller lease has recovered from the adjoining leases already? They have produced several hundred thousand barrels of oil from that lease, haven't they?

Mr. Griffin:

Eight years.

Mr. Rauhut:

Are you testifying, Mr. Griffin?

Mr. Griffin:

No. The witness testified it was 8 years.

A. It is hard to say how much that one well would produce from the adjoining leases.

Q. I didn't ask how much it would produce from the adjoining leases but how much in relation to the amount which the Fuller lease has already produced from the adjoining leases. Do you know how much oil the Fuller lease has produced up to date?

A. We have them available but I don't have them.

Q. It would be in the neighborhood of 200,000 barrels?

A. Something like that.

Q. How much less recoverable oil under that tract is there now than when the field was opened up?

A. Very little less.

Q. Not 200,000 barrels less?

A. No.

Q. Then I want to know would this one well produce during the remaining life of the field as much as that

200,000 barrels of oil if produced in accordance with the rules of the Railroad Commission under the present system of proration?

Mr. Rauhut:
I don't see the materiality of that.

Q. I would still like for him to answer the question. Could it possibly produce under the present proration rate of flow 200,000 barrels of oil?
A. I don't think so.
Q. Then how could you say it would drain the Fuller tract to drill the well?
A. It would produce more oil than is under this particular tract.

Mr. Rauhut:
The 2½ acre tract?
A. Yes.

Mr. Copeland:
How could it drain the Fuller tract if they have already drained 200,000 barrels from some other tracts?

Mr. Rauhut:
If you are making the point that the Fuller tract isn't entitled to the benefit of the past situation out there, we make the point that that is a matter of law.

Mr. Copeland:
I didn' say it wasn't. I am just asking about drainage. You said it would drain and I am trying to see where it would drain from.

Mr. Rauhut:
In other words, where would a well on the strip drain from?

Mr. Copeland:
Yes. You stated it would drain from the Fuller tract.

A. Yes.

Mr. Copeland:
That is all.

Mr. Griffin:
You mean that a well on the strip—

Mr. Rauhut:
We are not submitting our witness to cross examination by the applicant unless the applicant's witness submits to cross examination by us.

Mr. Copeland:
That is satisfactory. Any more witnesses?

Mr. Griffin:
No. You mean the representative of the applicant—you don't submit your witness to cross examination by the representative of the applicant in this hearing?

Mr. Rauhut:
I think that both sides are entitled to cross examination and make the point that we want to cross examine you who are the applicant's witness. We still want to cross examine you and examine you further about the things which you have testified to in connection with this application. I am just making the point and are perfectly willing for you to cross examine our witness if you are willing for us to cross examine you.

Mr. Copeland:
Anything further?

Mr. Griffin:
That is all we have. I would like to have it in the record that the attorney for the Sun Oil Company refuses to permit cross examination by the agent of the applicant.

Mr. Rauhut:
Let the record show the fact that we are offering our witness for cross examination by the applicant's representative as soon as the applicant's witness will let us cross examine him.

Mr. Griffin:
I would like to put in the record that Burford doesn't have a witness available for this hearing and there was no agreement by Burford to have a witness here.

Mr. Rauhut:
You refuse to let us cross examine you?

Mr. Griffin:
I am not a witness.

Mr. Stayton:
Let the record show that the Atlantic Refining Company adopts the evidence and statements made by the representatives of the Sun Oil Company and Magnolia Petroleum Company.

The State of Texas,
County of Travis.
I, Louise Kirtk, an employee of the Oil & Gas Division of the Railroad Commission of Texas, do hereby certify that the above and foregoing is a true and correct transcript of my notes made at the hearing held in Austin, Texas, at 10:00 A. M., May 19th, 1939, to the best of my skill and ability.

Witness My Hand on this the 9th day of June, A. D. 1939.

(Signed) LOUISE KIRK.

Sworn to and Subscribed before me, a Notary Public in and for Travis County, Texas, on this the 9th day of June, A. D. 1939.

(Signed) ROSE MODRALL,
Notary Public in and for
Travis County, Texas.

388 FRANCIS E. HEATH, called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Rauhut:

Q. State your name.

A. Francis E. Heath.

Q. What is your profession?

A. I am a petroleum engineer.

Q. By whom are you employed?

A. The Sun Oil Company.

Q. How long have you been a petroleum engineer?

A. I have been working at it since I was graduated from Pittsburgh University.

Mr. Cale:

We admit his qualifications.

Q. Have you had experience in the East Texas Oil Field?

A. Yes, sir.

Q. For how long?

A. Since oil was found in East Texas.

Q. You have been chief engineer for the Sun Oil Company during that period?

A. I have taken care of the petroleum engineering work.

Q. Have you familiarized yourself with the general geological and physical conditions prevailing in this field?

A. Yes, sir; I have studied them a great deal.

Q. Can you in a few words give a general picture of the field?

The Court:

Don't do that. That has been described to this Court, time after time.

Q. Are you familiar with the areas shown on Plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. Do you have a copy of this map there?

A. Yes, sir.

Q. Have you studied the sand conditions in that area?

A. Yes, sir. We have the west half of the Fuller lease, and the adjoining lease, on which we have studied the development, as well as the drilled area.

Q. Have you studied the reactions of that area to variances in pressure in the field?

A. Yes, sir; we have studied the reservoir reactions.

Q. Does that area on that map, as far as the production extends to the east, is that or not a common reservoir underlain with a blanket sand?

A. It is.

Q. That map shows conditions of May 19, 1939. I wish you would look at the west 50 acres of the Fuller Tract; namely, the part under lease to the Sun Oil Company; and further the 2.33-acres shown as X. Y. Z. Oil Company immediately east of it. Consider that entire 52-1/3 acres as one entire tract. Have you made a study

with respect to whether that 52-1/3 acres, without the Burford locations 1 to 4, was reasonably protected from drainage?

A. Yes, sir; I should say it was; and by that I mean to say that it certainly will recover its recoverable oil with the wells already drilled.

Q. The Burford locations, how far are they from the east line of the 52-1/3 acres?

A. 27 feet from the east line of the 52-1/3 acres.

Q. And approximately the same distance from the west line of the two and a third acres?

A. Slightly closer,—a foot or two closer; about the same to the west line.

Q. Will those locations drain any oil from the Sun Oil Company's lease?

A. Yes, sir. Less oil will be recovered from the Sun Oil Company lease because those wells are drilled.

Q. Does the Sun Oil Company have any wells that would serve as offsets to the Burford location?

A. Direct offset, no. The nearest well on the Sun Oil Company's lease is 281 feet from the west line of this two and a third acre tract, whereas the wells on the Tract are 23 feet from the line.

Q. If the Burford wells are allowed, will it be necessary, in your opinion, to drill any additional wells on adjacent leases by way of off-set?

A. You mean adjacent to the strip, considering it as a lease, or adjacent to the Fuller Tract?

Q. What is your opinion with respect to whether the Sun Oil Company would need offset wells to that strip?

A. Certainly, the Sun Oil Company should have to drill additional wells just to meet the offset.

Q. How about the Magnolia Petroleum Company?

A. The Magnolia meeting well for well would have to drill offset wells.

Q. How about tracts to the north and south of the strip?

A. They would have to meet development on the strip and the offset.

Q. If offsets were drilled, where, in your opinion, would it be necessary for your company to space them?

The Court:

Is it necessary to go into all those details? Why not ask him this question: Has he got any notion as to how much of your oil that these people will drain, so as to get on your jurisdictional question?

Q. Mr. Heath, can you give me some estimate of how much—can you state exactly how much oil?

The Court:

Of course, he can't. Ask him if he has any notion about it.

Q. Have you any notion as to how much oil the Burford Wells will drain from the Sun Oil Company that would otherwise be recovered by the Sun Oil Company's Wells, if these Burford Wells were not allowed?

A. I have some general figures on that, yes, sir.

Q. What sort of figures?

A. I might state this—perhaps I had better not make assumptions. I am only assuming from experience today that this lease will be drowned out with water, which is, I believe, a sound assumption; and with that as a background, I will say that with four wells on the strip, the Sun Oil Company would lose between seventy and one hundred thousand barrels of oil that it might have produced if those wells had not been allowed.

The Court:

And oil is worth about $1.00 a barrel?

A. $1.10.

Q. Are you familiar with what allowable was granted the wells in that area at the time this permit was granted?

A. The May schedule of the Railroad Commission—the wells were granted in June—all the wells capable of making twenty barrels of oil in this area were granted twenty barrels. All wells that could not make twenty barrels were permitted to produce what they could.

Q. No wells received more than twenty barrels?

A. Not in this immediate area.

Q. At this time is that situation with respect to allowables the same as it was in May, 1939?

A. The same schedule is in effect. The potentials have not been changed, so the basis of allowable is the same.

Q. Do you remember what the total allowable granted to the Sun's Fuller Wells were?

The Court:

What bearing can that have on the case?

Mr. Rauhut:

Merely to show that this tract was given some—

The Court:

These oil matters have so many various things about them that we could inquire into them for weeks. Every time I try one of these cases I learn something new; but I can't see that that makes the slightest difference. You put this witness on for the purpose of showing that you were going to suffer drainage if the Railroad Commission allowed these other people to top-rate these wells, you have further shown by the witness that your damages will be in excess of the jurisdictional amount. Now, what else do you want to show?

Q. Mr. Heath, had the Railroad Commission conditioned this permit from Mr. Burford in such a way that he would receive—as to lessen his allowable—give him

2.33 per cent of the allowable granted to the Fuller 100-acre tract—I mean the part under lease to Magnolia and Sun,--would that have allowed the Burford strip to produce in proportion to the adjacent tracts on an acreage basis—that is, the remainder of the Fuller tract?

A. Certainly.

Q. And under that arrangement would Burford have received ultimately the equivalent of the recoverable oil under his tract during its producing life?

A. You mean from then on out?

Q. Yes, sir; if he were allowed to produced merely in proportion—in the same proportion that the remainder of the 100 acres was allowed to produce, would he have been permitted to recover the equivalent of the recoverable oil in place?

A. I expect he would have from then on out. He certainly would have recovered at the same rate.

Q. Would that have lessened the drainage of oil from the Sun lease to the Burford lease?

A. Yes, sir; that would have reduced the amount of oil the Burford wells would have produced.

Q. Would the granting of the Burford wells, or the drilling and operating of them, and the drilling and operating of offset wells, have any effect upon the flowing life of the Sun Oil Company's wells adjacent?

A. It would have some effect on them, certainly.

Q. In which way?

A. The high concentration of wells which would result from drilling the large number of offset wells should materially at some point lower the pressure, which would reduce the flowing life.

Q. Would that in turn in crease the operating expenses to the Sun Oil Company and cause it a loss?

A. We certainly would not make as much money. We would lose money.

The Court:

Anything further, counsel?

Q. Mr. Heath, do you recall the permits granted to Mamie Hammonds and the trials with reference to those suits in the 53rd District Court of Travis County?

A. I recall the trials.

Q. Do you remember two suits to set aside permits to Mamie Hammonds on those strips?

A. Yes, sir.

Q. Were you present on those trials?

A. Yes, sir.

Mr. Hart:

Were there two cases in the 53rd District Court? As I recall, there was only one.

Mr. Rauhut:

There were two cases. I thought they were both in the 53rd.

The Court:

This evidence is absolutely inadmissible anyhow.

Mr. Rauhut:

Under the decision that I can cite I think it is admissible.

The Court:

What difference does it make whether he remembers? The papers in the case are the best evidence.

Mr. Rauhut:

We have the papers here, but we don't have the maps showing the conditions that existed in the ground at the time with reference to wells around there, and I want to ask him about that.

Q. As of those times when the Mamie Hammonds permits were granted, were the reservoir conditions—the sand under this strip and the adjacent tract in any way different from the way it is now?

A. No.

Q. The source of pressure was the same?

A. Yes, sir; it was probably a little higher.

Q. Higher then than now?

A. Yes, sir.

Q. The sand had the same porosity and permeability and other characteristics it has now?

A. Yes, sir.

The Court:

I don't know, but it seems to me so idle to ask all those questions. I went into all of that in two or three other cases here. The Supreme Court has held it is none of my business to talk about the permeability of the sand, and about the reservoir pressure and about rock pressure, and about the thickness of the sand—that those are administrative matters. Now, why bring all of that up and wash it out again here. The Supreme Court has the last say, and they have said it, so what is the use of my trying to do something different? You want to try this case over, just like they tried over the Rowan and Nichols case. You have one point here, but you won't pay any attention to that point. That is whether you have had a fair hearing. I am not interested in the thickness of this sand. I know all about the thickness of the sand in the East Texas field, and about the water drive, and all that sort of thing.

Mr. Rauhut:

All I am trying to develop is my res adjudicata point, which is good under the Texas law, and which the Supreme Court did not rule on in the Rowan and Nichols

case. The Texas cases say that is res adjudicata until there is a change of condition, and I want to show that there is no material change in conditions.

The Court:

I think you are wasting time in talking about the structure of the East Texas field, because I haven't anything to do with the structure of that field any more.

Mr. Robertson:

The District Court of Travis County has rendered a judgment that this particular strip was not about six years ago suffering confiscation of oil, and that a well or two wells on it was not under the conditions existing necessary to prevent waste. It is our contention that when the permits in this case were granted three or four years later, that the conditions were the same and that, therefore, the Railroad Commission could not set aside directly or indirectly the judgment rendered by the District Court of Travis County, on practically the same state of facts; and what we want to show now is that the facts have not changed.

The Court:

You may make your record on that, but I don't think there is anything to the point, because the Commission could take it up again.

Mr. Robertson:

It is our theory that if conditions have not changed the Commission cannot make another order and set aside the judgment of the Court.

The Court:

When was this case tried in Travis County?

Mr. Robertson:

The first one was tried in January, 1935.

The Court:

It is perfectly obvious that there have been changes in that reservoir, because there have been withdrawals there and changes in pressures, and changes in water encroachment; so, what is the use of taking that position? Everybody knows material changes have taken place in that reservoir since 1935. There have been enormous withdrawals of oil there, and we know water has been coming in from the west, and we know that the pressure has changed, and what is the use of taking a position like that? Ask him in a few words, if you want to, and see if he testifies that. Ask him if that reservoir is just the same now as in 1935.

Mr. Rauhut:

He has said the pressure is lower, and I am not contending it is not.

The Court:

Then why waste the Court's time trying to prove anything anything like that?

Mr. Rauhut:

I contend that is an immaterial change.

The Court:

The engineers all seem to think it is very material.

Q. Mr. Heath, in your opinion is there anything in the reservoir, or any change in the reservoir, as between the time of the Hammonds permit and this time which deprived the 52-1/3 acres of the Fuller tract of an opportunity to produce the equivalent of the oil under it, and

deprives it of a chance to be protected from drainage without the drilling of any wells on the strip?

A. We know more about the reservoir in this area, and I can see nothing that has been developed that would indicate that the wells that were drilled on the strip would not recover the oil under it.

Q. I didn't understand.

A. I mean on the Fuller 52-acre tract.

Q. From the standpoint of efficiently recovering the oil under that 52-1/3 acres, is there any difference in the condition there now? I mean are the wells that are there now, not counting the well locations on these strips, as able to efficiently recover the oil under the west 52-1/3 acres of the Fuller Tract now as they were at the time the Hammonds permits were granted?

A. In 1935?

Q. Yes, sir.

A We drilled three additional wells—three or four; and if there was any question about it in 1935, certainly we would better answer the question by having more wells. I think we have drilled too many wells, myself.

Q. What is your opinion with respect to this matter of drilling wells on the strip? Is it less necessary at this time than it was at the time of the Mamie Hammonds permit, for the purpose of either protecting the west 52-1/3 acres from drainage, or for the purpose of efficiently recovering the oil under it?

A. I don't think they are necessary now or then.

Mr. Rauhut:

That is all.

Questions by Mr. Robertson:

Q. You have given certain testimony as to the effect of drilling and the operation of any one or more of the wells on this strip—the effect of the operation of those

wells on the Sun Oil Company to the west. Would your testimony be practically the same as to the effect the operation of those wells will have on the operation of the Magnolia lease to the east?

A. Yes, sir.

Q. And as to the amount of oil that will be lost to the Magnolia Petroleum Company, would your testimony be the same, substantially?

A. I would say reduced somewhat.

Q. By about 50 per cent of that which would be lost by the Sun Oil Company?

A. You would lose a considerable amount. I couldn't say whether it would be 50 per cent, but probably roughly somewhere near that. You would not lose as much as the Sun would lose.

Mr. Robertson:

That is all.

Cross Examination.

Qustions by Mr. Cale:

Q. How long have you been employed by the Sun Oil Company?

A. Fifteen years.

Q. I believe you testified that you are familiar with this area?

A. Yes, sir.

Q. Isn't it a fact that the Sun Oil Company has already with the wells in place on this lease recovered an amount of oil equivalent to the amount of recoverable oil that originally underlay this tract?

The Court:

I don't think that has anything to do with this case.

Mr. Cale:

We take the position that it is necessary for them to show an injury.

The Court:

That is right; but under the capture doctrine they are entitled to get all they can get. If they can get it, they are entitled to get it.

Mr. Cale:

But the Texas Courts have held that the test of confiscation is whether the owner with the wells that he had already had been given a fair opportunity to recover the fair share of the oil under his tract.

The Court:

Yes; but I think they are entitled to recover oil as long as they can get it.

Mr. Cale:

I agree with that; but I don't believe they can say they have been deprived of their property without due process of law when they have already recovered an amount of oil substantially equivalent to the oil that originally underlay that tract.

The Court:

Do you think you are entitled to do anything you want to—

Mr. Cale:

I don't think they have a right to complain of the Railroad Commission's orders that try to give a man a man one well when they have produced eight or nine years, and this man has not produced any oil.

The Court:

That is another question. They come in here and say that you have this little tiny thread of land there that you allowed four wells to be put on, and that is in violation of your own rules, and that it is going to drain their land. Of course, a fellow who has a little piece of land will say, "You are draining my land."

Mr. Cale:

He will say then "They have been draining my land for nine years, and I am trying to get my share."

The Court:

I have been trying to indicate to counsel as we went along in this case that my idea of this matter is that I have not got anything to do with the matter of how the Commission issues these permits, and unless it could be so clearly shown that they are almost actually stealing something from somebody, and that the Court ought to intervene—then I don't know whether the Court still has any right to intervene—but I don't think this question you asked him, helps any.

Mr. Rauhut:

We object to the question.

The Court:

The objection will be sustained.

Mr. Cale:

I would like to say this, that we feel like after they have gotten all of the amount of oil that originally underlay that tract, that is all they were originally entitled to, after they have gotten that, we don't believe they should come here and complain because a man tries to drill an additional well—

The Court:

Oil is a wandering thing, and I drill an oil well and tap a reservoir and draw some oil out, and some more oil comes in from my neighbor's land; and under the Texas law I have a right to take that, and the duty rests upon my neighbor to be diligent and drill wells of his own so as to keep me from getting his oil, and that is the capture doctrine. Now, it may be that I have a 40-acre tract, and I have got so many feet thickness of sand, and so many thousands of barrels of oil there according to the estimates of the engineers, and I get it all out, but the fact is that from my neighbor's land an equal amount of oil comes in, so I have as much as I had to start with. That has been proven time and time again in these cases. I have a right to get that oil, and we used to think that if the Commission or anybody issued an order that kept us from doing it, it was taking our property without due process; so I don't think you have any right to say to these people, "Well, you can't make a complaint here, because you have already gotten all the oil you are entitled to", unless the capture doctrine is entirely gone, and you don't contend it is, do you?

Mr. Cale:

No, sir.

The Court:

Then, I think you are wasting time on that line of inquiry.

Mr. Cale:

Would it be proper to prove that for the purpose of the record?

The Court:

I will let you state it in the record later, but I would rather you would not take the Court's time to do it now.

Q. Mr. Heath, with reference to the 2.33-acre tract, before the Wells 1, 2, 3, and 4 were drilled thereon, there were no wells on the tract, were there?

A. Prior to any development there were no wells on each tract.

Q. That is in 1939, the 2.33-acre tract was clearly suffering drainage from all directions at that time with no wells on it?

A. You mean it was not producing any oil?

Q. I mean the oil was going from the area of high pressure to the area of low pressure.

A. But in all probability here you have compensated drainage to offset that movement.

Q. How could that be?

A. Because oil was moving, and the oil reservoir was chucked full.

Q. Under your theory, every time the reservoir was depleted it was again refilling?

A. Not depleted. The oil removed from the reservoir was simply replaced.

Q. By other oil?

A. That is right.

Q. Then the 2.33-acre tract was being deprived of the right to recover its fair share of the oil, but not having any wells?

Mr. Rauhut:

That is a mixed question of law and fact.

The Court:

The objection will be sustained.

Mr. Kuykendall:

I want to call the Court's attention to the fact that these leases were executed in December, 1930, and February, 1931, and the subdivision rule promulgated by the

Commission, and which has been offered in evidence in this case, was not promulgated until 1934, three years after these leases were executed, and we take the position that the rule could not be made applicable to these leases because the leases were executed three years prior to that time.

The Court:

I will sustain the objection. We will take a 10-minute recess at this time.

(Thereupon a recess was taken by the Court.)

Questions by Mr. Kuykendall:

Q. Mr. Heath, do you know whether or not Well No. 2 on this 2.33-acre tract has been plugged and abandoned?

A. Not to my own personal knowledge. I have not seen the plug in the abandoned well. I believe it might be so, but I don't know.

Q. You don't know whether oil was ever produced from that well or not?

The Court:

Aren't those negative matters that you should prove by your own witness, instead of asking somebody who doesn't know anything about it?

Q. Has the Sun Oil Company ever made any application for additional wells since these permits were granted to Burford?

Mr. Rauhut:

We object to that as irrelevant and immaterial, because we cannot be deprived of our rights to try out the validity of this order.

The Court:
The objection will be sustained.

Mr. Kuykendall:
That is all.

Witness excused.

Mr. Rauhut:
I have a stipulation to make. One is by agreement to offer notice of hearing on the last hearing before the Commission, for the purpose of showing who was notified of that hearing, and for the purpose of showing they merely notified those people who adjoined the 2.33 acres.

The Court:
Has adverse counsel seen it?

Mr. Cale:
We agree it is a copy of that sent out by the Railroad Commission.

The Court:
All right. Give it to the Reporter.

(Thereupon the Notice above referred to was marked for identification as Plaintiff's Exhibit No. 21, and same is herewith set out as foliows:)

Rehearing will be held in the offices of the Rule 37 department of the Oil & Gas Division of the Railroad Commission at 9:30 A. M., May 19, 1939.

Yours very truly,

STANFORD PAYNE,

Chief Deputy Supervisor Oil and Gas Division, Railroad Commission.

mk.

Mr. Rauhut:

I have asked Mr. Kuykendall whether we can stipulate as to all of this, and I think we can cut down on the time required is he is ready to give his answer on that.

Mr. Kuykendall:

There are some of these statements we can agree to, and others we cannot agree to, because I don't know whether they are true or not.

Mr. Rauhut:

The following part of paragraph 15 is, I understand, agreed to: On April 4, 1939, prior to the commencement of any operations on the well locations on the 2.33-acre tract, plaintiff advised G. E. Burford by prepaid telegram that it would file with the Railroad Commission of Texas a motion for rehearing, which was granted by the Railroad Commission's order of March 25, 1939. Said motion for rehearing was thereafter filed within the time permitted by the rules of the Railroad Commission with respect to such matters—

The Court:

Why is it necessary to do that in that particularity? Why couldn't you in one sentence say: "It is agreed that

at all times you contested their right to drill these four wells on this strip of land"?

Mr. Rauhut:
And kept them notified that we were going to keep on fighting.

The Court:
Isn't that all there is to it?

Mr. Rauhut:
I am willing to agree to it.

Mr. Kuykendall:
I don't know whether they proceeded with diligence or not.

The Court:
I don't care about that. They have been telling you all the time they have been opposing your doing it, and they are suing you in Court about it.

Mr. Kuykendall:
Yes, sir; they did.

The Court:
You knew all the time they were opposing it?

Mr. Kuykendall:
Ninety days after the permit was granted.

The Court:
How would you like to word it?

Mr. Kuykendall:
I think that the dates speak for themselves; that they did advise us by telegram.

Q. Do you know when that might be done?

A. No; I don't.

Q. From your familiarity with the sand conditions in that area, do you know whether or not at any time in the future there will be oil that can be produced from this well by a pump?

A. On the Well No. 4?

Q. Yes, sir.

A. I would think there would be. I think it is capable of producing oil if we put it on a pump, which would cost about $2,500.

Q. Nos. 1 and 3 are flowing?

A. Yes, sir.

Mr. Kuykendall:

That is all.

Mr. Rauhut:

No cross examination.

(Witness excused.)

413 GORDON GRIFFIN, called as a witness by defendants, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Kuykendall:

Q. State your name.

A. Gordon Griffin.

Q. And your profession?

A. Petroleum engineer.

Mr. Rauhut:

We waive his general qualifications.

Q. Mr. Griffin, did you appear as a witness in this case before the Railroad Commission?

A. Yes, sir.

Q. Were you formerly connected with the Railroad Commission?

A. Yes, sir.

Q. In what capacity?

A. I was chief engineer.

Q. In that capacity did you have occasion to familiarize yourself with the Texas Oil Field?

A. Yes, sir.

Q. Mr. Griffin, I hand you a map that is marked Plaintiff's Exhibit No. 2, January 31, 1939. What does that map reflect? Did you prepare the map?

A. I did not prepare the map. I drew the red line on the map.

Q. Was that offered in evidence at the time of the hearing before the Commission?

A. Yes, sir.

Mr. Kuykendall:

We desire to offer in evidence the map just identified for the purpose of showing the testimony that was before the Commission regarding the densities of areas surrounding this lease.

(Thereupon the map above referred to was identified and received in evidence as Defendant's Exhibit No. 1, and same is made a part of this record at page....)

Q. What does this map reflect—the red marks you referred to that you placed on the map?

A. It reflects the six times area around the tract of 102 acres, by folding the lease northward, northwestward, westward, southwestward and south. The area to the east, to the northeast, and southeast is dry—in other words, non-productive.

406 PLAINTIFF'S EXHIBIT No. 21.

State of Texas.

Railroad Commission of Texas,
Austin.

May 6, 1939.

Notice of Rehearing.

G. E. Burford,
4436 Fairfax Ave.,
Dallas, Texas.

Magnolia Petroleum Co.,
Dallas, Texas.

Sun Oil Co.,
Dallas, Texas.

The Atlantic Refining Co.,
c o H. C. Renz,
Box 2819,
Dallas, Texas.

Standard Oil Co. of Kansas,
Box 256,
Dallas, Texas.

J. G. Beard,
Duncan, Okla.

C. B. Jeffrey,
Littlefield Bldg.,
Austin, Texas.

H. L. Williford,
Railroad Commission,
Kilgore, Texas.

Gentlemen:

Please accept this as a notice of rehearing covering the application of G. E. Burford for a special permit to drill wells Nos. 1 to 4 inclusive on the W. L. Fuller 2.33 acre tract in the D. Sanchez Survey, Gregg County, Texas.

Location desired is as follows:

No. 1: 330' S. of the N. Line; midway between E. and W. lines.

No. 2: 489' S. of location #1; midway between E. and W. lines.

No. 3: 489' S. of location No. 2; midway between E. and W. lines.

No. 4: 330' N. of the S. line; midway between E. and W. lines.

In Rule 37 case No. 26,868 on March 25, 1939, the Commission granted well No. 2 at a point 819 feet south of the north line and midway between east and west lines and denied wells Nos. 1, 3 and 4. On April 29, 1939, the Commission granted applicant's motion for rehearing on his application for wells Nos. 1, 3, and 4 and also granted the Sun Oil Co.'s Motion for rehearing on well No. 2.

The Court:

Why then load the record with a lot of stuff like that? The fact is that you have known all the time that the Sun Oil Company was opposing your drilling those four wells there?

Mr. Kuykendall:

Yes, sir.

The Court:

And that they have been contesting it, and they have been telling you so, and that they have gone not only into Court but before the Commission and fought it; so why not say that, and not have all this long stipulation with dates and all that sort of thing?

Mr. Kuykendall:

We take the position that this permit was granted June 2 and they are allowed under the Railroad Commission's rules 20 days within which to file a motion for rehearing, and they waited until the last day.

The Court:

Well, what of it?

Mr. Kuykendall:

We say that it was done for the purpose of delaying

The Court:

That does not alter the fact.

Mr. Kuykendall:

I am perfectly willing to agree to that and state it in one sentence as you say.

The Court:
All right; somebody dictate it then. Can you dictate it, Mr. Rauhut?

Mr. Rauhut:
I will try. After the Commission granted the Burford permit for well No. 2, and denied the other wells in March, 1939, the Sun Oil Company notified him that it would file a motion for rehearing, which they did in proper time, and which the Commission granted. They further notified him when he started operations on the well that they would file a suit to set aside that permit, when they found out he had started operations; and then when the Railroad Commission granted the last permit, which is dated June 2, 1939, the Sun Oil Company notified him on June 7, that it would—

The Court:
That is what I was trying to get away from.

Mr. Rauhut:
We notified him we were going to fight him down the line, and within ten days after the Commission overruled our motion for rehearing we filed this suit.

Mr. Kuykendall:
I think those facts are true.

The Court:
Very well.

Mr. Rauhut:
Plaintiff rests.

Mr. Hart:
The defendant Railroad Commission asks judgment on the evidence.

Mr. Kuykendall:
We likewise ask judgment on the evidence.

The Court:
I will hear your testimony, gentlemen.

DEFENDANTS' EVIDENCE.

411 A. O. PHILLIPS, called as a witness by defendants, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Kuykendall:

Q. State you rname.
A. A. O. Phillips.
Q. Where do you live?
A. Dalls.
Q. What is your business?
A. Drilling contractor.
Q. Did you drill these four wells on the 2.33-acre lease involved in this case?
A. Yes, sir.
Q. Are all four of the weils producing?
A. No, sir.
Q. Which ones are not?
A. No. 2 and No. 4, I believe.
Q. Did No. 2 ever produce any oil?
A. No, sir.
Q. What about No. 4?
A. I think the well would produce, but it would have to be pumped.
Q. What are the completion dates on those wells?

A. Well No. 1, June 26, 1939; Well No. 2, April 10, 1939; that was a dry hole; we plugged that well. Well No. 3, July 16, 1939; Well No. 4, July 21, 1939.

Q. After the Railroad Commission had granted the permit to drill this No. 2, you proceeded to drill it for Mr. Burford?

A. Yes, sir.

Q. Are you familiar with the location of the well in the application of Mamie Hammond for a well in this area?

A. No.

Q. When did you contemplate or did you contemplate producing from No. 4—putting a pump in?

Mr. Rauhut:

May I ask a question by way of objection? Is this witness the owner of this lease? You asked him if he contemplates pumping it or producing it.

Mr. Kuykendall:

He operates the lease.

Mr. Rauhut:

We object to that question as irrelevant and immaterial to anything in the case.

The Court:

You alleged they have four wells there draining you. Your engineer testified that they damaged you some $70,000 worth. I think they are entitled to controvert that if they want to. The objection will be overruled.

Q. Mr. Phillips, are you contemplating installing a pump to produce the No. 4?

A. Well, why I have not is that I have been so short in money is all.

The Court:

What county is this in?

A. This is in Gregg County. It is up in the northeast end of Gregg County, and on the very eastern side of the field.

The Court:

It is a long way off the fairway?

A. Yes, sir; there is no oil production beyond the east side of the 102-acre tract.

The Court:

All right.

Questions by Mr. Hart:

Q. Mr. Griffin, I believe you testified that this lease is on the east side of the field. In that portion of the field up to the present time when oil has been withdrawn, has it been replaced by other oil pushing in there from other leases to the west of this area?

A. I think that has been true up to the time of the hearing, but I think from now on out that that will not be true.

Q. Explain your answer; I don't understand it.

A. I think that the pressures and withdrawals now in this area have been such, especially on the Magnolia Tract the wells are going on the pump, and there have been wells put on the pump even since the hearing.

Mr. Rauhut:

The validity of the permit is tested either as of the date that the Commission held the hearing to gather the facts to see whether or not it should grant the permit, or at least not later than the date of the granting of the permit; therefore, this is immaterial.

The Court:

I don't think the Court has anything to do with that. I think it is immaterial.

Q. In your judgment, have there been any changes in conditions in this vicinity since the rendition of the judgment in 1935 by the District Court of Travis County?

Mr. Rauhut:

I object to the question because it is too general. I would like for it to be confined.

The Court:

The objection is overruled.

Mr. Rauhut:

Note our exception.

A. The only thing that I can say relative to that would be that there have been additional wells drilled in that area, and where wells have been drilled they do have an effect upon the reservoir.

Q. Additional wells have been drilled on this 102-acre tract that you know of?

A. I had those dates that they were completed. I believe I am right. There were three on the Sun and at least two on the Magnolia.

Mr. Hart:

That is all.

Cross Examination.

Questions by Mr. Rauhut:

Q. The additional wells that you spoke of were on the Sun Oil Company's and Magnolia leases?

A. Yes, sir.

Q. The west 52-1/2 acres of the Fuller tract, have you made any study to determine whether it was as well-protected from drainage in May, 1939, as it was at the date of the Hammonds' permit; have you made a particular study of that question?

A. Not to determine whether or not they were protected from drainage, because the additional wells that have been drilled have helped prevent that. However, I think—

Q. Just confine it to my question.

A. Well, I don't believe I could answer that question.

The Court:

Anything further?

Q. Was the west 52-1/3 acres of the Fuller Tract as well developed from the standpoint of recovering the oil, and was it in better condition with the wells that it had as of May 19, 1939, to efficiently drain the area, than it was back when the Hammonds' permits were granted in 1934?

A. Unfortunately I do not know about the conditions as they existed; but I will say that the additional wells will cause this lease to be more efficiently drained now by virtue of those wells.

Q. I asked you whether this west 52-1/3 acres at the date of this hearing on May 19, 1939, was in better shape from the standpoint of efficiently recovering the oil under it than it was back at the time the Hammonds' permits were granted?

A. I think that is true.

Q. This map that Mr. Kuykendall showed you and which you identified, from the Commission's file, it shows a six times area of the Fuller 100 acres?

A. Yes, sir.

Q. Or 102-acres. What I asked,—does it show anything with respect to drainage?

A. It shows that the 102-acre tract is underdeveloped at the time of the hearing.

Q. Does it show anything with respect to whether it is being drained? Does density show anything?

A. Density does not have the influence upon drainage as does offset wells. In other words, it has always been my opinion that the farther wells are from the property, the less effect they have upon the drainage from a property.

Q. I asked you the effect of density in my question.

The Court:

Counsel, it is idle to go into that sort of stuff. I have nothing to do with that.

Mr. Rauhut:

The map was offered for some purpose, and I am merely showing the witness does not believe it has any effect. That is all.

Examination by the Court.

Q. This is all a comm n reservoir there, isn't it?

A. It is a common re ervoir. However, the sand conditions—

Q. They vary, of course?

A. They vary tremendously, of course, because they have a dry hole in the middle of it.

Q. And the depletion of pressure in the reservoir is common to the reservoir?

A. No, sir; I will say from now on out—

Q. I know; it will be maintained better in certain places?

A. That is true.

Q. But still it is all a common reservoir?

A. It is a common reservoir—all from the Woodbine sand.

Q. That sand out-crops around Dallas and comes on down there?

A. That is true; but it is not uniform and equal in that area.

The Court:
That is all.

Mr. Kuykendall:
That is all.

(Witness excused.)

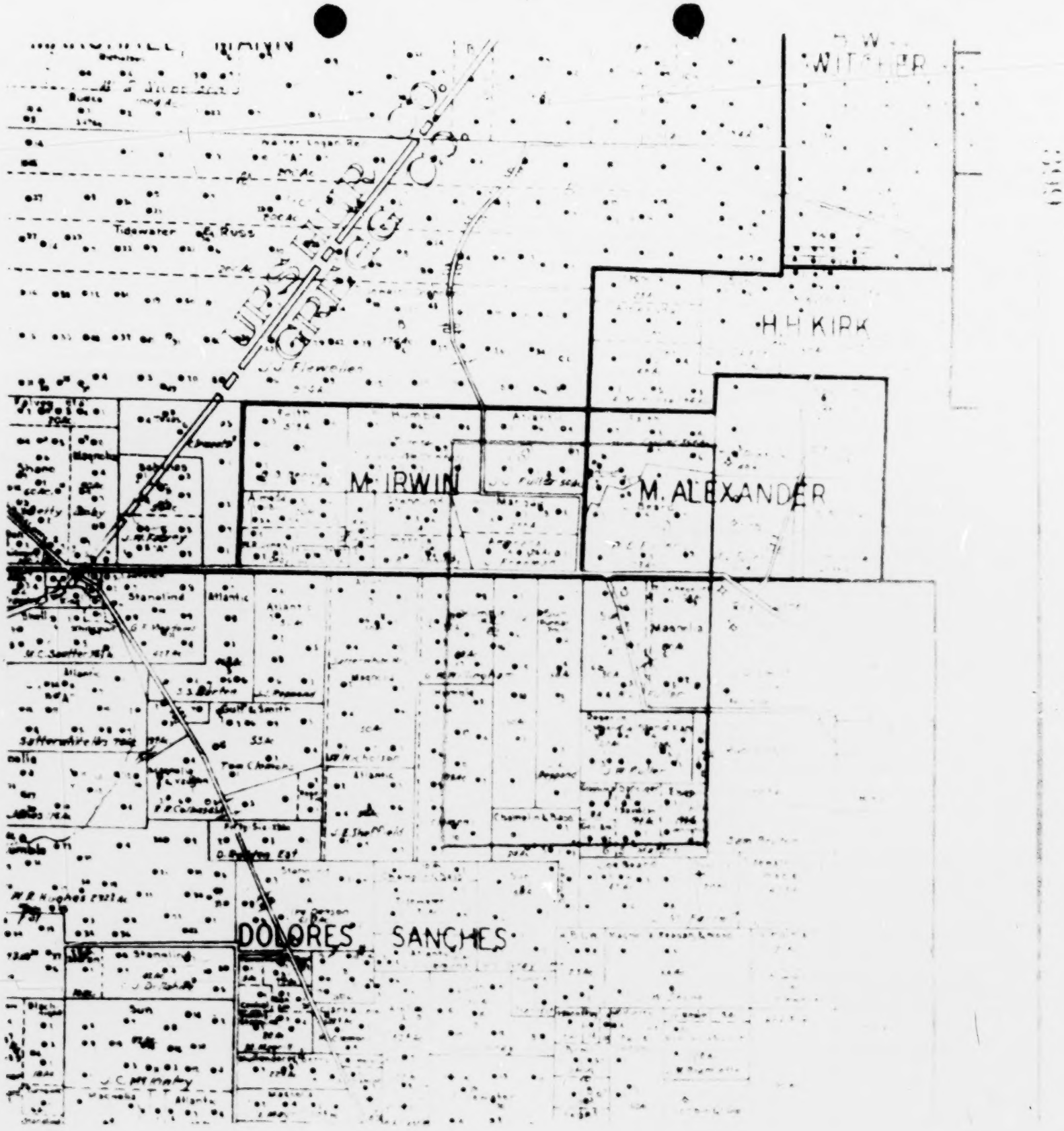
The Court:
Anything further?

Mr. Hart:
Nothing from the Commission.

The Court:
Anything further from the plaintiff?

Mr. Rauhut:
No, sir; we close.

Evidence closed.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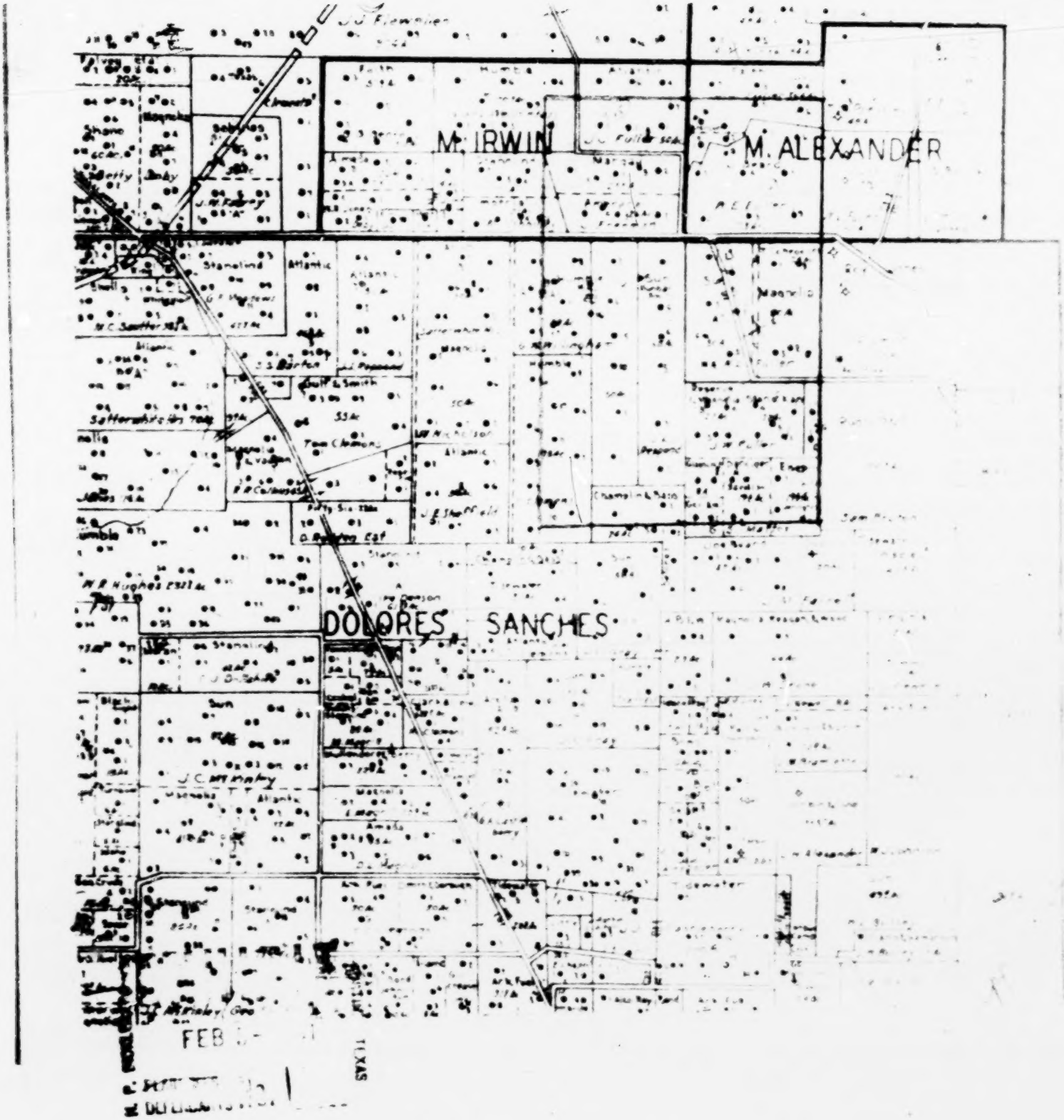
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M. ALEXANDER
DOLORES SANCHES
TEXAS

Transcript of Evidence. Filed 6th day of May, 1941.

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422 NOTICE OF APPEAL.

In the District Court of the United States, Western District of Texas, Austin Division.

Sun Oil Company, Plaintiff,
vs. Civil Action No. 28.
G. E. Burford, et al, Defendants.

Notice is hereby given that Sun Oil Company, plaintiff, and Magnolia Petroleum Company, interventer, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this cause on February 7, 1941.

(S.) J. A. RAUHUT,
Attorney for Appellant, Sun Oil Company.
(S.) J. B. ROBERTSON,
Attorney for Appellant, Magnolia Petroleum Company.

Address:
Austin, Texas.

Notice of Appeal. Filed 6th day of May, 1941.

APPLICATION OF PLAINTIFF AND INTERVENER FOR ORDER TO SEND UP ORIGINAL EXHIBITS.

423 (Title Omitted.)

To the Honorable Judge of said Court:

Now come Plaintiff Sun Oil Company and intervener Magnolia Petroleum Company, and request that Plaintiff's Exhibit Nos. 1, 5, 5a, 7 and 7a, introduced upon the

trial of this cause, be sent up to the Appellate Court in their original form, and in support thereof show the Court that said exhibits are plats and forms, and if presented in their original form it will aid the Appellate Court in reviewing the case.

Wherefore, Plaintiff and Intervener pray that the Clerk of this Court be instructed to send up, along with the record in this cause, Plaintiff's Exhibits Nos. 1, 5, 5a, 7 and 7a .

(S.) J. A. RAUHUT,
Attorney for Plaintiff.

Address:
Austin, Texas.

(S.) J. B. ROBERTSON,
Attorney for Intervener.

Address:
Austin, Texas.

Receipt of a copy of the foregoing application is hereby acknowledged, and further notice of the filing thereof is hereby waived, this the 24th day of May, 1941, and it is hereby agreed that the foregoing request be granted and that Plaintiff's Exhibits Nos. 1, 5, 5a, 7 and 7a, introduced in this cause, be sent up in their original form.

(S.) F. L. KUYKENDALL,
Attorney for Defendant G. E. Burford.

Address:
Austin, Texas.

(S.) JAMES P. HART,
Attorney for Defendant Rail road Commission of Texas.

Address:
Austin, Texas.

Filed 24th day of May, 1941.

ORDER GRANTING APPLICATION OF PLAINTIFF AND INTERVENER TO SEND UP ORIGINAL EXHIBITS.

425 (Title Omitted.)

On this the 26th day of May, 1941, came on to be considered the application of Plaintiff and Intervener in this cause, wherein they request that Plaintiff's Exhibits Nos. 1, 5, 5a, 7 and 7a, introduced upon the trial of this cause, be sent up to the Appellate Court in their original form; and it appearing to the Court that such request is reasonable and will aid in the understanding of the case by the Appellate Court, it is therefore Ordered, Adjudged and Decreed by the Court that Plaintiff's Exhibits Nos. 1, 5, 5a, 7 and 7a be sent up to the Appellate Court by the Clerk of this Court, and returned to the Clerk of this Court after the disposition of said appeal.

(S.) ROBERT J. McMILLAN,
Judge.

Entered: Min. Vol. 1, page 203.

Filed 26th day of May. 1941.

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426 APPEAL BOND.

(Title Omitted.)

Whereas, in the above styled and numbered cause pending in the United States District Court for the Western District of Texas, Austin Division, and at a regular term of said Court, on February 7, 1941, the Court entered a final judgment dismissing the suit of plaintiff, Sun Oil Company, and intervener, Magnolia Petroleum Company, against the defendants, G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas and the members thereof, E. O. Thompson, G. A. Sadler and Lon A. Smith; and

Whereas, the plaintiff and intervener on the 6th day of May, 1941, filed with the Clerk of said Court a notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

Now, Therefore, we, Sun Oil Company and Magnolia Petroleum Company, principals, and American Surety Company of New York, as surety, acknowledge ourselves firmly bound in the sum of $250.00 to G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas and the members thereof, E. O. Thompson, G. A. Sadler and Lon A. Smith, condition that Sun Oil Company and Magnolia Petroleum Company, appellants, will prosecute their appeal with effect and pay all costs if the appeal is dismissed or the judgment is affirmed, or such costs as the Appellate Court may award if the judgment be modified.

Witness the execution hereof this 6th day of May, A. D. 1941.

SUN OIL COMPANY,
By J. A. RAUHUT,
Its Attorney of Record.
MAGNOLIA PETROLEUM COMPANY,
By J. B. ROBERTSON,
Its Attorney of Record,
Principals.
AMERICAN SURETY COMPANY OF NEW YORK,
By W. T. DECHERD,
Resident Vice-President,
Surety. (Seal)

Attest:
F. T. ANDERSON,
Resident Asst. Secretary.

Authority of Signers for Surety.

Transcript from the Record Book of the Board of Trustees American Surety Company of New York.

"A meeting of the Board of Trustees of American Surety Company of New York was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 21, 1941, at twelve o'clock noon.

* * * * * *

"Upon motion duly made, seconded and unanimously carried, the following Resident Officers were elected, to hold office until their respective successors shall have been duly chosen and shall qualify, or until they shall resign or be removed as provided in the By-Laws:

Place: Austin, Texas.

Resident Vice-Presidents: J. R. Adams, F. T. Anderson, William T. Decherd, W. Jacques, George E. Shelley, E. A. Teague.

Resident Assistant Secretaries: J. R. Adams, F. T. Anderson, William T. Decherd, W. Jacques, T. B. Kellum, S. C. Linscomb, George E. Shelley, E. A. Teague.

* * * * * *

"The following resolution was duly adopted:

"Resolved, That the President, the Vice-Presidents and the Resident Vice-Presidents be, and they hereby are, and each of them is hereby authorized and empowered to execute and deliver any and all surety bonds and under-

takings for or on behalf of this Company, in its business and in accordance with its Charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of the Secretary, an Assistant Secretary, or a Resident Assistant Secretary of this Company."

* * * * * *

State of New York,
County of New York, ss.

I, H. E. Ising, Assistant Secretary of American Surety Company of New York, do hereby certify that the foregoing transcripts from the Record Book of the Board of Trustees of American Surety Company of New York are correct transcripts from said Record Book; I further certify that the foregoing transcript of resolution is a just, true, correct and complete copy of the original thereof.

Given under my hand and the seal of the Company, at New York, N. Y., this May 6, 1941.

H. E. ISING, (Seal)
Assistant Secretary.

Filed 6th day of May, 1941.

STIPULATION OF PARTIES DESIGNATING PARTS OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL.

430 (Title Omitted.)

It is stipulated by the parties to this suit that the following shall be included in the record to go to the Appellate Court:

1. Plaintiff's Amended Complaint;

2. Intervener's Amended Petition in Intervention;

3. Answer of G. E. Burford to Plaintiff's Complaint;

4. Answer of G. E. Burford to Intervener's Petition in Intervention;

5. Answer of Railroad Commission of Texas and its members to Plaintiff's Amended Complaint;

6. Amendment to Answer of Railroad Commission of Texas and its members to Plaintiff's Amended Complaint;

7. Answer of Railroad Commission of Texas and its members to Amended Petition in Intervention;

8. Amendment to Answer of Railroad Commission of Texas and its members to Amended Petition in Intervention;

9. Answer of X. Y. Z. Oil & Gas Company to Plaintiff's Amended Complaint;

10. Answer of X. Y. Z. Oil & Gas Company to Intervener's Amended Petition in Intervention:

11. Judgment;

12. Court's Findings of Fact and Conclusions of Law;

13. Plaintiff's and Intervener's Objections to Findings of Fact and Conclusions of Law and Request for Modification of Same and for Additional Findings;

14. Order Overruling Plaintiff's and Intervener's Objections to Findings of Fact and Conclusions of Law and request for Modification and Additional Findings;

15. Reporter's Transcript of the Evidence and Proceedings;

16. Notice of Appeal, with indorsement showing date of filing;

17. Application of Plaintiff and Intervener that certain exhibits be ordered sent up in original form.

18. Order directing that certain exhibits be sent up in original form;

19. Exhibits ordered sent up in original form;

20. Appeal Bond.

21. This Stipulation of the Parties.

It is further agreed that the foregoing constitute all of the record, proceedings and evidence in this cause except abandoned pleadings and certain other instruments which are recognized by all parties hereto as being immaterial to a full review of every issue in this case, and it is therefore agreed that the filing and serving of a statement of the points to be relied upon on appeal are hereby waived.

Witness our signatures this 14th day of May, 1941.

(S.) J. A. RAUHUT,
Attorney for Plaintiff.

(S.) GREENWOOD, MOODY & ROBERTSON,
J. B. ROBERTSON,
Attorney for Intervener.

(S.) JAMES P. HART,
Attorney for Railroad Commission of Texas and its Members.

(S.) F. L. KUYKENDALL,
Attorney for G. E. Burford and X. Y. Z. Oil & Gas Company.

Filed 14th Day of May, 1941.

432 CLERK'S CERTIFICATE.

The United States of America,
Western District of Texas, ss.

I, MAXEY HART, Clerk of the United States District Court in and for the Western District of Texas, do hereby certify that the foregoing on 431 pages is a true and correct transcript of proceedings had and orders entered, as therein stated, in Cause No. 28 Civil Action, styled Sun Oil Company, et al, versus G. E. Burford, et al, as the same appear on file and of record in this office.

I further certify that said transcript of record embraces only such pleadings, process and orders as are specified in the joint praecipe filed herein by the parties to the suit.

Witness my official signature and the seal of said District Court, at the City of Austin, Texas, this the 9th day of June, A. D. 1941.

MAXEY HART,
(Seal) Clerk of said Court,
By JOE STEINER,
Deputy.

[fol. 409] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 11, 1941

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

On this day this cause was called, and, after argument by J. A. Rauhut, Esq., for appellants, and James P. Hart, Esq., Assistant Attorney General of Texas, and Ed. Roy Simmons, Esq., Assistant Attorney General of Texas, for appellees, was submitted to the Court.

[fol. 410] OPINION OF THE COURT—Filed December 29, 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9962

SUN OIL COMPANY, et al., Appellants,

versus

G. E. BURFORD, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

(December 29, 1941)

Before Holmes and McCord, Circuit Judges, and Dawkins, District Judge

DAWKINS, District Judge:

Sun Oil Company filed its complaint against the Railroad Commission of Texas, G. E. Burford, and X. Y. Z. Oil Company, seeking the cancellation of a permit issued

to Burford for the drilling of four wells upon a tract of 2.33 acres of land in the East Texas oil fields, having dimensions of approximately 49 feet East and West by 2100 feet North and South. In the alternative, it sought to enjoin [fol. 411] the operation of such wells until the Commission, after notice and hearing, should fix the allowable to prevent this small tract from getting more than its full share of the oil in competition with complainant's tract of fifty acres on the West. Magnolia Petroleum Company owning fifty acres adjoining defendant's tract on the East, intervened and joined in the prayer of plaintiff for relief.

Jurisdiction was alleged to exist both because of diversity of citizenship, and the presence of a Federal question.

The petition charged that the Commission has, in effect, disregarded and violated its own rules and regulations in issuing the permit, and that the defendants are taking the oil in such quantities as to drain the lands of complainants and intervenors, resulting in gross discrimination, and the taking of appellants' property in violation of Texas laws and constitution, and the Fourteenth Amendment to the Federal Constitution.

The court below, while maintaining its jurisdiction, decided that it was controlled by the decisions of the United States Supreme Court in the two *Rowan & Nichols Oil Company* cases, 310 U. S. 573, and 311 U. S. 570, which it construed to require in "these conservation cases, the parties should be relegated to the State courts." For this reason, the complaint and intervention were dismissed.

In those cases, jurisdiction was invoked solely upon the ground of a Federal question, since there was no diversity of citizenship. In the first, at page 580 of 310 U. S., the court said that "the only question open to a Federal tribunal is whether the State action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercising of the State's regulatory power." But upon further consideration, this expression was stricken, and it was said that "the presence of a Federal question may also open [fol. 412] State issues * * *." This was, no doubt, because of the uniformity of past jurisprudence that once a Federal Court takes jurisdiction of a case, it will decide all issues, including those under State law. In the amendment to that opinion (311 U. S. 615), it was said that the

Texas courts had not determined whether "independent judgment" could be exercised by the courts in determining the reasonableness of the Commission's action; nevertheless, it was felt that the State decisions otherwise indicated that the "standard of 'reasonable basis' under the statute opens up the same range of inquiry as the respondent in effect asserted to exist in his claims under the Due Process Clause"; and since it had been found in the original opinion that the showing made in attempting to establish a lack of due process was insufficient, the court would not pursue the matter further "under the guise of enforcing the State statute." That seems to be the reasonable interpretation of what the court meant. The language used was: "What ought not to be done by the Federal courts when the Due Process Clause is invoked, ought not to be attempted by these courts under the guise of enforcing a State statute. In any event, it reversed the lower court's finding of discrimination, violation of the Commission's rules, etc., and reserved the right of complainants there to test the matter in the State courts. Had the decision remained as it was originally handed down, there might be some basis for a distinction in the present case because of the diversity of citizenship, but since that ground was withdrawn, we are forced to conclude, as did the Judge below, that if we find no violation of the Due Process Clause under the Federal Constitution, then we should not attempt to decide the reasonableness of the action of the Railroad Commission.

Ordinarily, where there is diversity of citizenship, and a cause of action exists under State law, the Federal court can and should exercise the same jurisdiction as would a [fol. 413] State court when dealing with the identical circumstances. Both the Federal constitution and the Act of Congress making it effective give citizens of another State the right to resort to the Federal courts and when this is done, those courts usually decide all of the issues involved, whether they be Federal or State. However, in this matter of enforcing the conservation laws of a State with respect to its natural resources, the Supreme Court appears to have set a precedent and made a distinction in which, if not expressly, at least by implication, they have said all issues other than questions under the Federal Constitution

should be relegated to the State court, as was found by the court below.

For more than twenty years, the Railroad Commission of the State of Texas, pursuant to the conservation laws of that State, has conducted investigations and had public hearings in an effort to work out a system for equitably controlling the production of gas and oil in the various fields of that State. After the bringing in of the big East Texas field, special provisions were made to deal with the situation created by its huge production, which, for a time at least, had the effect of demoralizing the oil industry of a good part of the country. These regulations dealt with spacing, quantities to be withdrawn and many other factors, which perhaps would have been unnecessary under normal conditions, but at all times, provision has been made for exceptions to protect what was first termed "vested rights," and later to prevent "confiscation." It was evidently considered that in changing the size of tracts to be drilled, the spacing of wells with respect to each other and from property lines, and restrictions upon the quantity to be allowed from each well, some owners or lessees might be denied the right to produce from their lands at all, under general rules applicable to the field. This resulted from the sizes and dimensions of some tracts with respect to ownership and leases. In such cases, the Commission, after in- [fol. 414] vestigation and notice to the parties interested, attempted to work out a solution that would not be unfair to either the owner of such tracts or adjoining proprietors. There have been many instances where those affected have differed with or questioned the action of the Commission both as to the facts and law or rules and regulations governing these matters. It is but natural that some mistakes would be made, but as pointed out by the Supreme Court in the *Rowan & Nichols* cases, these were matters which a body like the Commission with the assistance of its experts, the use of public hearings at which members of the industry could appear and be heard with suggestions for better regulations was more qualified to work out than a court of justice. In the absence of a clear showing of confiscation or lack of Due Process, such bodies should be left, at least by the Federal courts, to deal with the situation, unless and until the court of last resort of the State has decided that an "independent judgment" as to reasonableness should be exercised by the courts.

There are many elements in the present case, such as the fact that the 2.33 acres involved here was separated or divided from the larger tract before the adoption of special provisions for the East Texas field, in August, 1931; one or more of the wells drilled proved to be a dry hole; the encroachment of water from the Southwest has caused the oil under the lands involved to be replenished after withdrawals, and the complainants have had a head start or nearly ten years in withdrawing oil, undoubtedly including that under the property of defendants. The Commission has found that these and other considerations were sufficient to warrant the exception made in the present case. There is no charge of fraud or wilful abuse of power. The Commission has had at least three hearings upon this particular matter at which the interested parties have appeared and there has been no lack of opportunity for [fol. 415] presenting the contentions of the parties. Whether the State court eventually will hold, as contended by the appellees, that in a judicial review of the Commission's action, the common law rule of substantial evidence applicable to a jury's verdict, shall prevail, of course, remains to be seen. Suffice it to say that we do not find in this case conditions amounting to a denial of Due Process or other violations of the Federal Constitution.

The judgment appealed from is affirmed.

[fol. 416] JUDGMENT

Extract from the Minutes of December 29, 1941

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the

said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Sun Oil Company, and another, and the surety on the appeal bond herein, American Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fols. 417-422] PETITION FOR REHEARING—Filed January 19, 1942

NO. 9962

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,

Appellants,

vs.

G. E. BURFORD, ET AL.,

Appellees.

APPELLANTS' PETITION FOR REHEARING

TO THE HONORABLE COURT:

Sun Oil Company and Magnolia Petroleum Company, appellants in the above entitled and numbered cause, petition the court to grant a rehearing on the opinion delivered and judgment entered herein on December 29, 1941, and on such rehearing to reverse the judgment of the trial court and render judgment for appellants in accordance with the prayer in appellants' brief, and in the alternative, to reform and correct the judgment of the trial court in such a way as to dismiss without prejudice the questions of State law raised in this case in order that appellants will not be foreclosed, by the unqualified dismissal entered by the trial court and affirmed by this court, from

obtaining an adjudication of such questions of State law in a suit to be hereafter filed for that purpose in the courts of the State of Texas, and as grounds respectively show:

1.

This court, having decided that the issues of State law should be relegated to the State courts for determination, erred in affirming and failing to reform the trial court's general judgment of dismissal, in such a way that it will not be a bar to presentation of the issues of State law to the State courts, in a suit to be filed for such purpose.

2.

The trial court erred in concluding and holding that the various matters of State law raised present no Federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction, and erred in not dismissing the matters of State law without prejudice, if it was not the court's duty to decide such questions; and this court erred in not so holding.

3.

The trial court erred in rendering judgment against appellants, dismissing the action and refusing to cancel the permits and enjoin drilling and operation of the locations involved, because as a matter of law the 2.33 acres was voluntarily subdivided from adjoining lands in such a way that it could not be separately developed in compliance with the spacing rule in existence at the time or any subsequent rule, "to prevent confiscation of property," the sole ground on which it was granted, there being no evidence that the west

52.33 acres of the Fuller tract from which it was subdivided in derogation of the rule needed more wells for such purpose, the application not having been presented or decided on that basis, and notice of hearing not having been given to all who would have been entitled to notice on that basis, and the undisputed evidence having shown that the west 52.33 acres was protected from drainage; and this court erred in not so holding.

4.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits involved and enjoin the drilling and operation of the wells, because as a matter of law the judgment for appellants in Cause No. 54769 (consolidated with No. 54743) is **res adjudicata** of the permits here involved; and this court erred in not so holding.

5.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits and enjoin drilling and operation of the well locations involved, because the pendency of Cause No. 53915 deprived the Railroad Commission of jurisdiction to grant said permits; and this court erred in not so holding.

6.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits and enjoin drilling and operation of the locations involved, because as a matter of law there was no substantial evidence before the Railroad Commission of a necessity for

four locations, or more than one, to be drilled on said 2.33 acres, considered separately, to prevent confiscation of property, and the permits were arbitrarily granted without authority in the State law, and deprived appellants of equal protection of the law and deprive them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and Section 17 of Article I of the Constitution of Texas; and this court erred in not so holding.

7.

The trial court erred in rendering judgment against appellants refusing the alternative relief requested by them for an injunction against the production of oil from the wells in controversy until the Railroad Commission shall, after due notice and hearing, enter an order so adjusting the allowable production from the wells on the 2.33 acres that the total daily allowable from the wells thereon shall not bear a greater proportion to the total daily allowable fixed by the Commission for the wells on the remainder of the Fuller 100 acre tract than the oil reserves in place under the 2.33 acres bear to the oil reserves in place under the remainder of the Fuller 100 acre tract; and this court erred in not so holding.

8.

The trial court erred in its finding of fact No. V, to the effect that the conditions have so changed since the granting of the Hammonds permit for well No. 1 on the strip that the judgment in Cause No. 54769 is not **res adjudicata** of the permits in the case at bar; and this court erred in not so holding.

9.

The trial court erred in concluding and holding that the challenged order of the Railroad Commission does not violate any of the rights of plaintiff or intervener under the Fourteenth Amendment to the Constitution of the United States; and this court erred in not so holding.

WHEREFORE, appellants pray that a rehearing be granted and that upon such rehearing the opinion and judgment of this court dated December 29, 1941, be set aside and judgment be rendered for appellants as prayed for in their brief; but, in the alternative, if this court continues to be of the opinion that it should not decide the questions of State law and that they should be relegated to the State courts for determination, that the judgment of the trial court be modified and corrected by judgment of this court, or under direction of this court, to qualify the dismissal so that it will be without prejudice to an adjudication by the State courts of the questions of State law presented in this case.

Respectfully submitted,

GREENWOOD, MOODY & ROBERTSON
J. B. ROBERTSON
Austin, Texas
Attorneys for Magnolia
Petroleum Company.
T. L. FOSTER
MARTIN A. ROW
Dallas, Texas
POWELL, RAUHUT & GIDEON
J. A. RAUHUT,
Austin, Texas
Attorneys for Sun Oil Company.

I, J. A. Rauhut, an attorney of record for appellant Sun Oil Company in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness my hand, this 16th day of January, 1942.

J. A. RAUHUT.

[fol. 423] ORDER DENYING REHEARING

Extract from the Minutes of February 2, 1942

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 424] APPELLANTS' SECOND PETITION FOR REHEARING AND MOTION FOR LEAVE TO FILE SAME—Filed June 1, 1942

No. 9962

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

SUN OIL COMPANY, et al., Appellants.

vs.

G. E. BURFORD, et al., Appellees

APPELLANTS' SECOND PETITION FOR REHEARING AND MOTION FOR LEAVE TO FILE SAME

To the Honorable Court:

Appellants show that at the present term of this court it rendered its judgment on December 29, 1941, affirming that of the trial court; that, exhibiting the requisite diversity of citizenship, this suit was brought to hold invalid and cancel a well drilling permit and to enjoin operation of wells thereunder, on two separate grounds for relief: (a) as a statutory suit under Section 8, Article 6049c, Ver. Ann. Tex. Civ. Stats.; (b) on the ground that the order violated appellants' rights under the Fourteenth Amendment to the Federal Constitution. This court overruled appellants' contentions with respect to the second ground, but expressly [fol. 425] refused to decide the questions of State law presented in the statutory suit.

Subsequently, on May 13, 1942, in Cause No. 9729, Selby Oil & Gas Co., et al., vs. Railroad Commission, et al., being a similar case wherein there was also diversity of citizenship, this court held that it has the power to decide, and it did decide, the questions of State law therein presented in connection with the statutory suit; and it expressly refused to follow the prior holding in the Burford case, after examining the matter on its merits.

In the light of this action, in the interest of even justice, and in order that appellants will not be denied an adjudication of the questions of State law herein presented and wrongly decided by the trial court, appellants move this court to reconsider their petition for rehearing heretofore timely filed on January 19, 1942, each ground of which is here adopted, and to this end request leave to file this Second Petition for Rehearing.

Wherefore, appellants pray that this Second Petition for Rehearing be filed, that their petition for rehearing be reconsidered, that a rehearing be granted, and that judgment be rendered in accordance with the prayer therein.

Respectfully submitted, Greenwood, Moody & Robertson, J. B. Robertson, Austin, Texas, Attorneys for Magnolia Petroleum Company. T. L. Foster, Martin A. Row, Dallas, Texas; Powell, Rauhut & Gideon, J. A. Rauhut, Austin, Texas, Attorney-for Sun Oil Company.

[fol. 426] I, J. A. Rauhut, an attorney of record for appellant Sun Oil Company in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness my hand, this 26th day of May, 1942.

J. A. Rauhut.

Acknowledgment of Service

Service of the foregoing petition for rehearing and motion is acknowledged, this the 27th day of May, 1942.

(Signed) James P. Hart, Attorney for Appellees G. E. Burford and XYZ Oil & Gas Company. (Signed) Gerald C. Mann, (Signed) E. R. Simmons, Attorneys for Appellees Railroad Commission of Texas and its Members.

[fol. 427] APPELLEES' OPPOSITION TO APPELLANTS' SECOND PETITION AND MOTION FOR LEAVE TO FILE SAME—Filed June 3, 1942

No. 9962

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

SUN OIL COMPANY, et al., Appellants,

v.

G. E. BURFORD, et al., Appellees

Appealed from the District Court of the United States for the Western District of Texas

APPELLEES' OPPOSITION TO APPELLANTS' MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

To the Honorable Circuit Court of Appeals:

Appellees respectfully show that the Appellants' Second Petition for Rehearing should not be filed for the following reasons:

1. The rules of this court do not contemplate the filing of second petitions for rehearing, especially where, as in this case, such petitions merely reiterate contentions already made and overruled. Upon this point, Julge Holmes said in *City of Stuart* v. *Green*, 91 F. (2d) 603, 606:

[fol. 428] "* * * Our rules do not contemplate the filing or consideration of second applications for rehearing. The petition now filed presents nothing that had not been previously considered. Such practice is not to be encouraged. Williams v. Conger, 131 U. S. 390, 9 S. Ct. 793, 33 L. Ed. 201."

2. Even if second petitions for rehearing might be filed and considered under some conditions, the second petition for rehearing in this case is presented too late.

Judgment of affirmance was entered by this court in this case on December 29, 1941. A first petition for rehearing was filed on January 19, 1942, and was overruled on February 2, 1942. The mandate was issued by the Clerk of this court on February 17, 1942, and was received and filed by the Clerk of the District Court on February 19 1942. Noth-

ing further was done by appellants until their Second Petition for Rehearing was served on counsel for appellees on May 27, 1942, and thereafter presented to this court.

(a) Where a petition for rehearing is overruled, a second petition for rehearing should be presented not later than the date on which the rules provide that the mandate of this court shall issue. Rule 32 of this court provides that where an application for rehearing is denied, "the mandate will be stayed for a further period of ten days," and that "no further stay will be granted unless applied for within the delay given above." While the rule further provides that a mandate may be recalled by the court "to prevent injustice," this provision certainly was not intended to cover the situation where there is merely an effort to reopen points already thoroughly presented and considered.

In *Browder v. M'Arthur*, 7 Wheaton, 58, the Supreme Court held that "it was too late to grant a rehearing in a cause after it had been remitted to the court below, to carry into effect the decree of this court, according to its mandate. * * *" Similarly, in *Sibbald v. United States*, 12 Pet. 488, 492, the Supreme Court said:

[fol. 429] "After a mandate, no rehearing will be granted."

See also *Peck* v. *Sanderson*, 18 How. 42.

Since, in the present case, the second petition for rehearing is presented more than three months after the mandate was issued, under the rules stated above, it should not now be filed.

(b) A second petition for rehearing should not be filed and considered after the expiration of the time fixed by statute for applying for review by appeal or certiorari to the Supreme Court of the United States. Under the provisions of Section 350 of Title 28 of the United States Code, three months were allowed to appellants in which they might make application for review of this court's judgment by the Supreme Court. Since the first petition for rehearing was denied on February 2, 1942, the period for making application for appeal or certiorari expired on May 2, 1942. The second petition for a rehearing was presented more than three weeks after the expiration of the three months' period allowed for appeal or certiorari.

The essential ground of the appellants' complaint against this court's decision is their contention that it is based upon a misconstruction of the decision of the Supreme Court in the *Rowan & Nichols* case, 310 U. S. 573. The appellants had a plain remedy to review this court's ruling by applying for appeal or certiorari to the Supreme Court. They did not avail themselves of this remedy, but stood by and let the full three months' time elapse. They have not shown the proper diligence and should not be permitted now to reopen the case.

A plain analogy to the present situation is found in the Rules of Civil Procedure for the United States District Courts. Rule 59(b) provides that ordinarily motions for new trial must be filed within 10 days after the entry of judgment, but that "a motion for new trial on the ground of newly discovered evidence may be made after the expira-[fol. 430] tion of such period *and before the expiration of the time for appeal*, with leave of court obtained on notice and hearing and on a showing of due diligence."

This rule has been construed to mean that after the expiration of the time for appeal, the District Court loses jurisdiction to consider a second motion for new trial. *Abruzzino v. National Union Fire Insurance Co.*, 35 F. Supp. 925.

The same reasoning that warrants the quoted provision of Rule 59(b) in the District Courts would require the conclusion that the Appellants' Second Petition for Rehearing comes too late in this case. There must be some end to litigation. Even where the time for presenting a motion for rehearing may be extended in the discretion of the court, this time should not be extended beyond the extreme limit within which relief may be sought in a higher court.

Interested persons are entitled to assume that litigation is ended when the time for seeking relief in the appellate court has expired without any move being made to obtain such relief.

3. On the merits, appellees believe that this court's judgment is clearly correct. This argument, however, is directed merely to the right of the appellants to file their Second Petition for Rehearing, and we, therefore, refrain from arguing the merits at this time. If Appellants' Second Petition for Rehearing should be entertained by the

court, appellees respectfully request an opportunity to reply fully on the merits.

Respectfully submitted, Gerald C. Mann, Attorney General of Texas; Ed Roy Simmons, Assistant Attorney General, Attorneys for Appellees, Railroad Commission of Texas, et al. F. L. Kuykendall, James P. Hart, Brown Building, Austin, Texas, Attorneys for Appellees, G. E. Burford and X. Y. Z. Oil & Gas Company.

[fol. 431] MEMORANDUM IN SUPPORT OF SECOND PETITION FOR REHEARING AND REPLY TO APPELLEES OPPOSITION—Filed June 8, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 9962

SUN OIL COMPANY, et al., Appellants,

vs.

G. E. BURFORD, et al., Appellees

MEMORANDUM IN SUPPORT OF APPELLANTS' SECOND PETITION FOR REHEARING AND REPLY TO APPELLEES' OPPOSITION THERETO

To the Honorable Court:

1. It is a universally recognized rule of law that "During the term in which a decree is entered, the court entering it may, in the exercise of its discretion, on motion for rehearing or otherwise, change, modify, or set aside its decree." *Obear-Nester Glass Co. vs. Hartford-Empire Co.*, (C. C. A. 8th) 61 F. (2d) 31, 33; *Basset vs. United States*, (1869) 9 Wall. 38, 41, 19 L. Ed. 548; *Henderson vs. Carbondale Co.*, 140 U. S. 25, 11 S. Ct. 691, 696; *Unitype Co. vs. Long*, (C. C. A. 6th) 149 F. 196; *Judson vs. Gage*, (C. C. A. 2nd) 98 F. 540, 543; *Mahler vs. Animarium Co.*, (C. C. A. 8th) 129 F. 897, *Winslow v. Staab*, (C. C. A. 2nd) 242 [fol. 432] F. 426; *Greyerbiehl v. Hughes Elec. Co.*, (C. C. A. 8th) 294 F. 802, cert. den. 44 S. Ct. 402; *I. C. C. vs. L. & N. R. Co.*, (U. S. C. C.) 101 F. 146; *Miocene Ditch Co. vs.*

Moore, (C. C. A. 9th) 150 F. 483. Hence, the second petition for rehearing, filed at the same term and invoking the discretionary power of the court, is not presented too late. In fact, the time limit fixed by the rule for filing of original petitions for rehearing is for the court's protection and may be waived by it. *Burget vs. Robinson*, (C. C. A. 1st) 123 F. 262, headnote 1; *Unitype Co. vs. Long, supra.*

2. For the purpose of modifying, changing, or setting aside its decree, the appellant court may, before the expiration of the term, recall the mandate after it has been issued. Rule 32 of the Court; 5 C. J. S. 1561; *Bank vs. Tennessee*, (1896) 163 U. S. 416; 16 S. Ct. 1113, 1117; *Thomsen vs. Cayser*, (1916) 243 U. S. 66, 37 S. Ct. 353, headnote 1; *Clarke vs. Boysen*, (C. C. A. 8th) 273 F. 923.

Appellees site three very old decisions of the Supreme Court of the United States (*Browder vs. McArthur*, (1822) 7 Wheat. 58; *Sibbald vs. United States*, (1838) 12 Pet. 488; and *Peck vs. Sanderson*, (1855) 18 How. 42) in support of their contention that after the mandate has issued, it is too late to grant a rehearing even at the same term. In the first place, the decisions are not in point, in that each involved motions for rehearing presented at a subsequent term of court. The Sibbald case (12 Pet. 448, 452) recognizes the principle that a court may change its judgment at the *same* term. In the second place, in the subsequent [fol. 433] cases of *Bank vs. Tennessee, supra*, and *Thomsen vs. Cayser, supra*, the Supreme Court itself furnished ample precedent for allowing a rehearing at the same term, even though the mandate had been issued, the procedure being to recall and reform the mandate if a rehearing is granted after issuance of the mandate. In *Burget vs. Robinson*, (C. C. A. 1st) 123 F. 262, 264, the general language in the Browder case quoted by appellees was expressly discussed, and of it the court said:

"Of course, all rules stated so broadly are subject to certain limitations and qualifications. * * * Browder v. McArthur is a notable example of this fact because, in Bank v. Tennessee * * * as the court clearly perceived that it had made an error in its judgment, although the judgment was that of the court, and a mandate had already issued, it was recalled, and the judgment modified."

Appellants, of course, understand that if this court decides to grant a rehearing, it will, in connection therewith

and to prevent injustice, recall the mandate heretofore issued, such being merely ancillary to the accomplishment of the rehearing; and appellants hereby expressly request that such be done.

3. Conceding that second petitions for rehearing are not encouraged, for which reason there is no express rule fixing a time for filing same, second petitions are not unknown but are granted when justice so requires. Appellants' second petition for rehearing should be granted, in that it is based upon the contrary holding of this court in the Selby Oil & Gas Co. case, made at the same term, and subsequent to the filing and overruling of appellants' original petition for rehearing in this cause. Thus, the second petition pre-[fol. 434] sents both a new and an unusual situation, which could not have been raised heretofore, and which is calculated to appeal to the purpose of this court to render even justice, applying the same rule of law to all occupying the same situation.

The situation here is quite analogous to that in *Unitype Co. vs. Long, supra*, in which the court granted a petition for rehearing filed *after* expiration of the period fixed by the court's rule, but *before* expiration of the term, recalled the mandate previously issued, and reversed its original opinion, on the basis of a subsequent decision declaring the law differently from that applied in the original opinion.

The decision cited by appellees construing District Court Rule 59(b) is not applicable here by analogy, in that the Circuit Court has no such rule, and the purposes served by the District Court rule are not apposite here.

Wherefore, appellants pray that a rehearing be granted, that the mandate be recalled, and for judgment in accordance with the prayer in the original petition for rehearing.

Respectfully submitted, Greenwood, Moody & Robertson, J. B. Robertson, Austin, Texas, Attorneys for Magnolia Petroleum Company; T. L. Foster, Martin A. Row, Dallas, Texas, Powell, Rauhut & Gideon, J. A. Rauhut, Austin, Texas, Attorneys for Sun Oil Company.

[fol. 435] Order Granting Leave to File Second Rehearing and Recalling Mandate

Extract from the Minutes of July 6th, 1942

No. 9962

Sun Oil Company, et al.,

versus

G. E. Burford, et al.

It is Ordered that the motion of appellants for leave to file a Second Petition for Rehearing be granted, and that the action of the Clerk of this Court in filing said appellants' Second Petition for Rehearing on June 1st, 1942, be, and the same is hereby, approved.

It is Further Ordered that the mandate of this Court, issued to the Clerk of the United States District Court for the Western District of Texas, at Austin, on February 17th, 1942, be, and the same is hereby, recalled.

[fol. 436] Opinion of the Court on Appellants' Second Petition for Rehearing—Filed July 11, 1942

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 9962

Sun Oil Company, et al., Appellants,

versus

G. E. Burford, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

On Appellants' Second Petition for Rehearing

(July 11, 1942)

Before Holmes and McCord, Circuit Judges, and Dawkins, District Judge

Holmes, Circuit Judge:

Our rules do not contemplate a second petition for rehearing,[1] but this one was allowed to be filed because of an

[1] City of Stuart v. Green, 91 F. (2) 603, 605.

alleged conflict within the circuit of decisions rendered by [fol. 437] this court at this term.[2] Although the mandate in this case has been sent down, there is no reason why it may not be recalled by the court during the same term to prevent injustice.[3]

In opposition to our recalling the mandate and considering a second petition for rehearing, the appellees have cited four decisions of the Supreme Court, some of which contain language indicating that we do not have the power to do so.[4] A careful examination of these cases reveals that in none of them was the effort to have the mandate recalled, or a second petition for rehearing considered, brought up at the same term of the court. This is a vital distinction, because it is the general rule that courts have full control over their orders and judgments during the term at which they were rendered, with certain exceptions, none of which are applicable here. *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 40. Therefore, to avoid injustice to any one from a conflict in our decisions, we have ordered the mandate recalled, and shall proceed to a consideration of the second petition for a rehearing on its merits.

The decision in this case was rendered on December 29, 1941. The case of *Selby Oil & Gas Company v. Railroad Commission of Texas, supra*, was decided by this court on May 13, 1942. In the meantime, the Supreme Court of Texas held that the courts of that state might exercise an independent judgment upon the validity of oil-proration orders of the Railroad Commission of Texas. In these circumstances, in order to make sure that even handed justice will be done in both cases, we have determined to grant a rehearing in this one, and to remand it for retrial in the court that is to retry the *Selby* case. In so doing,

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[2] Sun Oil Co. v. Burford, 124 F. (2) 467; Selby Oil & Gas Co. v. Railroad Commission, — F. (2) —.

[3] Rule 32 of Rules of United States Circuit Court of Appeals for the Fifth Circuit; Thomsen v. Cayser, 243 U. S. 66.

[4] Browder v. M'Arthur, 7 Wheat. 58; United States v. Sibbald, 12 Pet. 488; Peck v. Sanderson, 18 How. 42; Williams v. Conger, 131 U. S. 390.

we deem it necessary to restate the governing law of the case, as follows:

[fol. 438] When a federal court has jurisdiction of a controversy on the ground of diversity of citizenship, it has the power to decide all issues arising therein under the laws of any state in accordance with the statutes and decisions of that state; the same rule obtains where federal jurisdiction attaches solely by reason of a federal question.

In *Railroad Commission of Texas et al. v. Rowan & Nichols*, 310 U. S. 573, 311 U. S. 570, 615 (followed by this court in our opinion reported in 124 F. (2) 467), the Supreme Court did not either abrogate or engraft an exception upon the well-settled doctrine that when a federal court once properly takes equitable jurisdiction of a controversy on any ground it may decide all questions of law and fact necessary for a complete disposition of the case. In denying the motion for a rehearing (311 U. S. 615), the Supreme Court withdrew its first statement announcing a contrary doctrine except where jurisdiction rests upon diversity of citizenship.

The *Rowan & Nichols* decisions, *supra*, are determinative of the federal rule in equity now applicable in suits for injunctive relief against orders of the Texas Railroad Commission so far as attack thereon is based on the "vague contours of the due-process clause" of the Fourteenth Amendment. What was done in those cases, as was pointed out in the dissenting opinions therein,[5] was radically to change the application of equitable principles in suits to enjoin administrative regulations under the conservation laws of a state.

The gist of the law on the subject, as presently understood, is that in promulgating such regulations the State Commission is performing delegated legislative functions, and the federal courts should not substitute their judgment [fol. 439] for that of the Commission with respect to what is wise and fair in the economy of the state. At the same time the federal court, if it has jurisdiction, may enjoin the

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[5] See dissenting opinion of Mr. Justice Roberts, concurred in by Chief Justice Hughes and Mr. Justice McReynolds, citing Thompson v. Consolidated Gas Utilities Corp., 310 U. S. 584.

enforcement of a void order in a suit by any one injuriously affected by it. If the order is not arbitrary, but rests upon a reasonable basis in fact, it is not violative of the Fourteenth Amendment; if valid under said amendment, it may be invalid under local law, in which case the federal court should not decline to strike it down; but, if the local law is doubtful, the federal court should stay its hand until the matter has been decided by the state court.[6]

When the *Rowan & Nichols* cases were decided, the Texas law did not clearly appear from state decisions. Recently, however, in *Railroad Commission, et al. v. Shell Oil Co., Inc., et al.*, decided March 11, 1942, 161 S. W. (2) 1022, the Supreme Court of Texas has spoken with authority upon the subject. We now know the legal requisites of orders and regulations of the Railroad Commission under the conservation laws of Texas. They are governed by the same principles of construction as are generally applied in construing state statutes. They must contain a guide or standard applicable alike to all individuals similarly situated, so that any one interested may determine his own rights or exemptions thereunder. The administrative agency may not exercise an unbridled discretion to enforce them against some and to refuse to enforce them against others. Even though fair on its face, if an order or regulation is administered with an evil eye and an unequal hand, it is invalid.

The Texas Railroad Commission did not exhaust its authority under the conservation laws by adopting the general provisions of Rule 37. It may change that rule [fol. 440] or make exceptions to it, but it may not provide one rule for a specific person or class and a different rule for another person or class, unless there is some reasonable factual basis for making the distinction. A reasonable margin for error of judgment must be allowed the Commission by the courts of Texas. The courts must respect the accepted demarcation between legislative and judicial

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[6] Railroad Commission of Texas, et al. v. Rowan & Nichols, 310 U. S. 573, 311 U. S. 570, 615; Railroad Commission of Texas, et al. v. Pullman Company, et al., 312 U. S. 496.

power,[7] and may not trespass upon the legislative discretion of the Commission in determining the wisdom or reasonableness of any rule, order, or regulation. Whether the Commission heard evidence or not is immaterial; it is not required to take testimony or make findings of fact before promulgating its orders. Such procedure is foreign to the laws of Texas, although customary under federal statutes. If the facts in existence when the order was made, as later shown by evidence before the court, were such that reasonable minds could not have reached the conclusion arrived at by the Commission, or if the agency exceeded its power, then the order should be set aside by any court of competent jurisdiction. To determine the validity of the order, the question is not whether the agency actually heard evidence, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same.

Examining further the opinion of the Supreme Court of Texas in the above case, we find that the standard of reasonableness under the Texas law, set up for the Commission in determining the validity of its orders and regulations, is identical with that ordinarily used in determining the validity of state statutes under the due-process clause of the federal constitution.[8] Thus, one of the cases relied

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[7] See Art. 11, Sec. 1, of the Texas Constitution, dividing the powers of government into the legislative, executive, and judicial, and providing that no person or collection of persons in one department shall exercise any power properly attached to either of the others, except in the instances therein expressly permitted.

[8] "Since the Legislature has seen fit to vest authority to exercise sound judgment and discretion in the particular matter in the administrative agency, courts will not undertake to usurp powers committed to the agency, and to exercise the agency's judgment and discretion for it. For example, in contesting an order of a commissioner's court fixing a tax rate, or an order of a school board concerning management of schools, the court will not put itself in the position of the administrative agency for the purpose of determining whether or not the action was wise. * * *

"* * * In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the

[fol. 441] upon by the Supreme Court of Texas is a decision interpreting the Fourteenth Amendment, decided by the United States Supreme Court, *Yick Wo v. Hopkins*, 118 U. S. 356.

This exemplifies the statement of Mr. Justice Frankfurter in *Railroad Commission v. Rowan & Nichols Oil Co.*, 311 U. S. at page 615, that the standard of reasonable basis under the Texas statute opened up the same range of inquiry as was asserted under the due-process clause of the Fourteenth Amendment. Hence the crucial words of the opinion, which are not *dictum* but the very *ratio decidendi* of the case, that what ought not to be done by the federal courts when the due-process clause is invoked ought not to be attempted by them under the guise of enforcing a state statute.[9]

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agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same. Whether the agency heard sufficient evidence is not material. In fact, the evidence heard by the agency is not per se admissible upon the trial in the district court. Whether it is admissible upon the trial in the district court must depend upon its own merits under the general rules of evidence, and without regard to whether it had theretofore been introduced before the agency. Magnolia Petroleum Co. v. New Process Production Co., 104 S. W. (2d) 1106; Railroad Commission of Texas v. Magnolia Petroleum Co., 109 S. W. (2d) 967; Lone Star Gas Co. v. State of Texas, 137 Tex. 279, 153 S. W. (2d) 681." Railroad Commission, et al. v. Shell Oil Co., Inc., et al., decided March 11, 1942, 161 S. W. (2) 1022.

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[9] "But, in any event, as we read the Texas cases, the standard of 'reasonable basis' under the statute opens up the same range of inquiry as the respondent in effect asserted to exist in his claims under the Due Process Clause. These latter claims we have found untenable. What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by

[fol. 442] Mr. Justice Frankfurter was not discussing a question of federal jurisdiction. He was discussing the discretion of a chancellor in a federal equity suit in cases where the court concededly has jurisdiction. The matter of the issuance of the extraordinary writ of injunction is, and historically has always been, one for the exercise of sound discretion.[10] We cannot emphasize too strongly that in none of these oil-proration cases did the Supreme Court refer to the question of federal jurisdiction. In none of them did it hold that the federal court did not have jurisdiction. We go further and say that in none of them did the court hold that federal equitable jurisdiction did not exist. What it did hold was that, although the federal court had jurisdiction and the case was one of an equitable nature, the facts were such that, in the exercise of its equity jurisdiction, the court was bound by equitable principles to deny the petition for the issuance of the extraordinary writ of injunction. Following the above decision, that is what the court below did in this case, at the same time expressly holding that it had jurisdiction.

A federal court does not impugn its jurisdiction when in the exercise thereof it denies a discretionary writ. Especially is this true when a federal court exercises its equity jurisdiction in deciding that there has been no violation by state action of the federal constitution, and there remains a doubtful question of state law depending upon the construction of a state statute that ultimately can only be de-

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the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the federal courts." Railroad Commission of Texas, et al. v. Rowan & Nichols, 311 U. S. 615. Later followed and cited in the second Rowan & Nichols case, 311 U. S. 577.

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[10] "This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers. Compare 37 Stat. 1013; Judicial Code, Sec. 24 (1), as amended, 28 U. S. C., Sec. 41 (1); 47 Stat. 70, 29 U. S. C., Sections 101-15." Railroad Commission of Texas, et al. v. Pullman Company, et al., 312 U. S. 496, 501.

cided authoritatively by the state courts.[11] More espe- [fol. 443] cially is this true when, in these circumstances a federal equity court withholds its discretionary writ because of economic and geological perplexities that arose in a state in attempting to accommodate conflicting private interests in an oil field with due regard to its conservation policies; and still more is this true when a discretion afforded by equity jurisprudence is exercised as a matter of comity so as to avoid friction in state and federal relations under our dual form of state and national governments.

We do not agree that this action contains two suits, a "constitutional suit", under the due-process clause, and a "statutory suit", under the civil statutes of Texas, as stated by this court in the majority opinion of May 13, 1942, *supra*. We have here only one suit. It is of an equitable nature, and is called a civil action under the Federal Rules of Civil Procedure. In it the plaintiff seeks to have the court declare void a regulatory order of a state agency and to enjoin the drilling of any oil well under it. This is the only relief sought. The alleged grounds of its invalidity are that it violates both the local law and the due-process clause of the Fourteenth Amendment. It is elementary that no court should decide a constitutional question unless its decision is necessary to the disposition of the case.

The uncertainty under the Texas decisions as to whether or not the local courts may exercise an independent judgment on what is reasonable under the Texas statute having been removed by the above-mentioned recent decision of the Supreme Court of Texas, we think, upon a retrial of this case, the district court should first determine whether the order is in conformity to the laws and constitution of

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[11] "The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play." Railroad Commission of Texas, et al. v. Pullman Company, et al., 312 U. S. 496, 500.

the state.[12] If not, that ends the matter and renders un- [fol. 444] necessary any determination under the federal constitution. If the order should be held valid under the local law, it would then be the duty of the court to pass upon any federal constitutional question presented, though it is difficult to see how the order could be held reasonable under the local statute and unreasonable under said due-process clause, or *vice versa*, since the standard of reasonableness is the same in each instance.

We have seen that the rule, order, or regulation is presumed to be valid under the law of Texas, and that the regulatory body is not required to hear testimony in support of it. Therefore, the question for the district court in this case is not whether there was substantial evidence before the Commission to support the order, but (1) whether it is in legal form and valid on its face, and, if it is, (2) whether at the time of its promulgation there existed facts that warranted fair and reasonable minds in arriving at the conclusion that the order was proper and necessary to prevent the waste of public resources or confiscation of private property.

We should not overestimate the importance of the rem-

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[12] "If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of state law may be settled by appropriate action on the part of the State to enforce obedience to the order. Beal v. Missouri Pacific R. Co., supra; Article 6476, Texas Civil Statutes. In the absence of any showing that these obvious methods for securing a definite ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands. Compare Thompson v. Magnolia Co., 309 U. S. 478." Railroad Commission of Texas, et al. v. Pullman Company, et al., 312 U. S. 496, 501.

edy provided by the state statute [13] for testing the validity of the conservation laws of Texas and the rules, orders, or regulations promulgated thereunder. This statute confers [fol. 445] jurisdiction on the courts of Texas; it does not extend or restrict the jurisdiction of the district courts of the United States. The latter courts are given power to receive jurisdiction only by the Federal constitution; this jurisdiction is conferred solely by the Congress of the United States. A state statute may create rights that the federal courts will enforce or protect; it cannot enlarge or restrict the equitable jurisdiction of the federal courts.[14] This was true of suits in equity even before the federal rules of civil procedure were adopted; and, now that the Conformity Act has been repealed or superseded by the new rules,[15] it is true of all civil actions in the federal courts except as otherwise provided by federal statutes or federal rules of civil procedure.[16] The merging of legal and equi-

[13] Sec. 8, Art. 6049 (c), Vernon's Annotated Texas Civil Statutes, which is referred to by this court in the majority opinion of May 13, 1942, supra, as the basis of a "statutory suit" wherein "jurisdiction rested on diversity of citizenship" in contradistinction to what is called "the constitutional suit" under the due-process clause of the Fourteenth Amendment.

[14] Ex parte McNiel, 80 U. S. 236; Case of Broderick's Will, 88 U. S. 503; Reynolds v. Crawfordsville Bank, 112 U. S. 405, 410; Whitehead v. Shattuck, 138 U. S. 146; Scott v. Neely, 140 U. S. 106; Pusey & Jones Co. v. Hanscnn, 261 U. S. 491, 498; Dobie on Federal Procedure, page 662.

[15] Sibbach v. Wilson & Co., Inc., 312 U. S. 1.

[16] Rule 82 provides: "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." As to particular remedies provided by state laws, see Rules 4 (d) (2) (7), 64, and 69 of the Federal Rules of Civil Procedure. Cf. Act of June 1, 1874, c. 200, 18 Stat. 50; Sections 722, 915, 919, and 933 of Revised Statutes of United States. In Moore's Federal Practice, Vol. 1, p. 210, it is said: "The Federal Rules of course establish an independent practice and procedure for all actions in the federal courts heretofore denominated legal and equitable, and therefore no state statute affecting practice and procedure will have effect in the federal courts, except in so far as the Rules themselves specifically adopt state statutory law."

table procedure in the new federal rules had no effect upon substantive legal rights, and the courts must still apply equitable principles to equitable rights and legal principles to legal rights.[17]

Section 8 of said statute, however, does illustrate that no purely judicial powers were conferred upon the Texas Railroad Commission by the conservation laws of Texas; and, as construed by the Texas Supreme Court, it shows that the courts of that state may exercise an independent [fol. 446] judgment as to what is reasonable in preventing waste. Said Section 8 also conferred jurisdiction on the Texas courts to construe the conservation statutes of the state which has been done by the highest court of that state in the above case.[18] So far as that decision deals with substantive rights under the statute,[19] it is binding on the federal courts; but it is wholly ineffective to control the discretion of a chancellor exercising federal equitable jurisdiction. In some instances this discretion is absolutely controlled by federal statutes restricting or prohibiting the granting of injunctive relief in specified cases, particularly in labor disputes, against the collection of taxes, and against state rate orders. Under Rule 2 of the Federal Rules of Civil Procedure there is but one civil action in lieu of procedures at law and in equity; substantive rights are not affected. Federal statutes and decisions determine when, under the facts, the extraordinary writ of injunction shall be granted by the federal courts.[20]

The judgment of this court herein, dated December 29, 1941, will be set aside, the judgment appealed from reversed and this cause remanded to the district court for further proceedings not inconsistent with this opinion.

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[17] 48 Stat. 1064; 28 U. S. C. A., Sec. 723 (b) (c); Moore's Federal Practice, Vol. 1, pp. 208-213.

[18] Railroad Commission, et al. v. Shell Oil Co., Inc., et al., decided March 11, 1942, 161 S. W. (2) 1022.

[19] State statutory authority to bring suit may be a substantive right that the Federal courts will enforce if a case involving such right is within their jurisdiction. Broderick's Will, 21 Wall. 503, 22 L. Ed. 599; Richardson v. Green, 61 Fed. 423, Cert. den., 159 U. S. 264; Sawyer v. White, 122 Fed. 223.

[20] 1 Moore's Federal Practice, pp. 202-208.

McCord, Circuit Judge Specially Concurring:

The original opinion in which we affirmed the District Court in this case was handed down on December 29, 1941, and petition for rehearing was denied on February 2, 1942. Since that time the Supreme Court of Texas has clarified [fol. 447] the questions of State law involved here. *Railroad Commission, et al. v. Shell Oil Co., Inc., et al.*, March 11, 1942, 161 S. W. 2d 1022. Moreover in the case of *Selby Oil & Gas Co. v. Railroad Commission*, No. 9729, — F. 2d —, in an opinion by Judge Hutcheson we rendered a decision which is in conflict with the opinion first handed down in this case. I very much doubt that we have the right after the lapse of such a great length of time, after the time allowed for filing petition for a writ of certiorari has expired, to reopen the case and grant a new trial as has been done here. If, however, this motion is timely and legally granted, the two cases can on a new trial be determined in conformity with the decision of the Supreme Court of Texas, and the conflict that now exists in our two opinions may be obliterated.

[fol. 448] Judgment of December 29, 1941, Set Aside, Etc.

Extract from the Minutes of July 11th, 1942

No. 9962

Sun Oil Company, et al.,

versus

G. E. Burford, et al.

It is ordered by the Court that the second petition for rehearing filed by appellants in this cause on June 1st, 1942, be, and the same is hereby, granted;

It is further ordered that the judgment of this Court entered on December 29, 1941, whereby the judgment of the District Court of the United States for the Western District of Texas was affirmed, be, and the same is hereby, set aside;

On further consideration of this cause, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court appealed from be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court rendered on July 11th, 1942.

[fols. 449-453] APPELLEES' PETITION FOR REHEARING—Filed July 29, 1942

No. 9962

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,
Appellants,

v.

G. E. BURFORD, ET AL.,
Appellees.

PETITION FOR REHEARING

To The Honorable Circuit Court of Appeals:

G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas, and Ernest O. Thompson, G. A. Sadler, and Olin Culberson, members of the Railroad Commission of Texas, petition the court to grant a rehearing on the opinion delivered and the judgment entered herein on July 11, 1942, and on such rehearing to affirm the judgment of the district court, and, as grounds therefor, respectfully show:

1.

This court erred in holding that it had jurisdiction to grant the appellants' second petition for rehearing, because such petition was filed more than three months after the appellants' first petition for rehearing was overruled and more than three months after the mandate had been issued.

2.

If this court had jurisdiction to grant appellants' second petition for rehearing, it abused its discretion in granting such petition in this case, because such petition was not filed until more than three months after the appellants' first petition for rehearing was overruled and more than three months after the mandate had been issued and in the meantime appellants had not shown the requisite diligence in that they failed to exercise their right to apply to the Supreme Court of the United States for writ of certiorari.

3.

This court erred in holding that the United States District Court is required to exercise an "independent judgment" in determining the validity of the Railroad Commission's order under the state law.

4.

If the district court should have exercised an independent judgment in determining the validity of the Railroad Commission's order under the state law, still the judgment of the district court should be affirmed and not reversed, and this court erred in not so holding, because:

(a) The issue of the reasonableness of the Railroad Commission's order was developed by evidence heard originally in the district court, and not merely by evidence heard by the Railroad Commission. (R. 102-399)

(b) The district court did not refuse to pass on the issues of state law, but expressly held that under the state law the order was valid. (R. 87, 91)

(c) This court has already determined that the order of the Railroad Commission has reasonable support in the evidence, and, therefore, even by the test laid down by this court in its second opinion, the district court was correct in refusing to issue an injunction against the enforcement of the Railroad Commission's order, upon the ground of alleged invalidity of the order under the state law as well as upon the ground of alleged conflict with the Fourteenth Amendment.

(d) This record shows affirmatively that at the time of the promulgation of the Railroad Commission's order there existed facts that warranted fair and reasonable minds in arriving at the conclusion that the order was proper and necessary to prevent confiscation of private property.

(e) No question of the legal form or validity of the order on its face has been raised by the pleadings or evidence in this case, and the order on its face is valid and legal.

(f) The decision of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Company*, 161 S. W. (2d) 1022, does not require a reversal of this case, since the district court in this case heard original evidence and, judged by the tests established by the Supreme Court of Texas, the record in this case shows that the order of the Railroad Commission is valid.

Wherefore, the appellees, G. E. Burford, XYZ Oil & Gas Company, the Railroad Commission of Texas, and Ernest O. Thompson, G. A. Sadler, and Olin Culberson, members of the Railroad Commission of Texas, pray that a rehearing be granted and that upon such rehearing the opinion and judgment of this court dated July 11, 1942, be set aside and

judgment be rendered affirming the judgment of the district court.

Respectfully submitted,

GERALD C. MANN,
Attorney General of Texas
ED ROY SIMMONS,
Assistant Attorney General
Austin, Texas
Attorneys for the Railroad Commission of Texas and Its Members

F. L. KUYKENDALL,
JAMES P. HART,
Austin, Texas
Attorneys for G. E. Burford and X. Y. Z. Oil & Gas Co.

CERTIFICATE OF COUNSEL

I, James P. Hart, an attorney of record for appellees G. E. Burford and X. Y. Z. Oil & Gas Company in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness my hand, this ..... day of July, 1942.

.....

SUPPORTING ARGUMENT

I. *The appellants' second petition for rehearing was filed too late and should not have been entertained or granted by this court.*

We respectfully urge that this court could not have realized fully the implications and consequences of its action in entertaining and granting a second petition for rehearing in this case. The effect of this court's holding is that no judgment of this court can ever be considered final until the term in which the judgment was rendered has expired. Although the rules do not state the length of the terms of court, we gather from the court's opinion that each term of court lasts for one year. This means that a judgment cannot be considered final—even if a petition for rehearing has been filed and overruled, even if the mandate has been issued, and even if the time for obtaining relief in the Supreme Court has expired—until the term of court has ended.

In this case more than three months had expired after the first petition for rehearing was overruled and the mandate issued, before the second petition for rehearing was filed, but it might as well have been ten or eleven months. The paralyzing effect of this holding on property rights is evident. Even though a party has been completely successful in the district court and in this court (as the appellees were in this case)—even though a petition for rehearing has been overruled—even though the man-

[fols. 454-466] MOTION OF REPUBLIC NATIONAL BANK OF DALLAS FOR LEAVE TO FILE PETITION IN INTERVENTION IN THE NATURE OF A PETITION FOR REHEARING AND PETITION IN INTERVENTION—Filed August 1st, 1942

No. 9962

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,
Appellants

v.

G. E. BURFORD, ET AL.,
Appellees

MOTION OF REPUBLIC NATIONAL BANK OF DALLAS FOR LEAVE TO FILE PETITION IN INTERVENTION IN THE NATURE OF A PETITION FOR REHEARING

To The Honorable Circuit Court of Appeals:

Comes now Republic National Bank of Dallas (hereinafter called petitioner) and files this its motion for leave to file its petition in intervention in the nature of a petition for rehearing and respectfully shows the court:

I.

The petitioner is a national banking association, organized and existing under the Acts of the Congress of the United States of America and having its domicile and place of business in the City of Dallas, Dallas County, Texas.

II.

As appears from the records of this court and the District Court in this case, on February 2, 1942, this court overruled the appellants' first petition for rehearing and on February 17, 1942, this court's mandate was issued and was filed in the District Court on February 19, 1942.

III.

Thereafter, on February 27, 1942, the petitioner, relying on what the petitioner believed to be the finality of this court's judgment, made a loan to A. O. Phillips, of Dallas, Dallas County, Texas, of the sum of $90,000.00. Said loan is payable in accordance with the terms and provisions of a promissory note in the principal amount of $90,000.00, dated February 27, 1942, signed by A. O. Phillips, payable to the petitioner in 35 monthly installments of $1,500.00 each, beginning on March 20, 1942, and thereafter on the 20th of each succeeding month until such 35 installments have been paid, and the balance of un-

paid principal and interest to be paid on the 20th day of the next succeeding month. Said A. O. Phillips is the owner of an oil payment interest, in the original principal sum of $42,000.00, payable out of 5/8 and 7/8 of the production of oil and gas from the land and the oil wells in controversy in this case, by conveyances from the appellee G. E. Burford. The said note for $90,000.00 is secured by a deed of trust executed by the said A. O. Phillips, dated February 27, 1942, conveying to R. J. MacBean, Trustee, certain property, including the oil payment interest of the said A. O. Phillips in the said property involved in this case. On February 27, 1942, the unpaid balance of the said oil payment was approximately $31,000.00, and $30,000.00 of said $90,000.00 loan was allocated by the petitioner to the said oil payment interest of the said A. O. Phillips.

IV.

The petitioner is now the owner and holder of the said note executed by the said A. O. Phillips, the unpaid balance of principal and interest on said note being the sum of $84,931.09. The unpaid balance of said oil payment interest is $27,499.39, and the said oil payment interest of the said A. O. Phillips is now part of the security for the repayment of said loan.

V.

By reason of the facts hereinbefore stated, the pe-

titioner has a substantial interest in the outcome of the present suit and the said interest is similar to the interests of the appellees (other than the Railroad Commission of Texas and its members) and such interest is not in conflict with the interests of any of the appellees. The consent of all of the appellees to the filing of said petition in intervention by the petitioner has been obtained.

VI.

In making said loan and in accepting said security therefor, petitioner relied upon what it in good faith believed to be the final action of this court in overruling the appellants' first petition for rehearing. The appellants did not prosecute an appeal or apply for a writ of certiorari to the Supreme Court of the United States in this case. The action of this court in granting the appellants' second petition for rehearing, which was filed more than three months after the order overruling the appellants' first petition for rehearing, seriously and injuriously affects the petitioner's property rights acquired in reliance upon this court's judgment, in that the value of a large part of the security taken by the petitioner for said loan is impaired and its value is rendered problematical and speculative. In order to prevent injustice to the petitioner, the judgment entered by this court on July 11, 1942, should be set aside and the judgment entered on December 29, 1941, should be reinstated, for the reasons set out in the attached petition in intervention in the nature of a petition for rehearing.

VII.

Wherefore, the petitioner, Republic National Bank of Dallas, respectfully prays that leave be granted to file the attached petition in intervention in the nature of a petition for rehearing, and for such other and further relief as shall be just and proper.

.....

Dallas, Texas
Attorney for Republic
National Bank of Dallas.

THE STATE OF TEXAS
COUNTY OF DALLAS

Before me, the undersigned authority, on this day personally appeared ....., known to me, who, being by me duly sworn, upon his oath says that he is Vice-President of the petitioner, Republic National Bank of Dallas, that he is duly authorized to make this affidavit for the said petitioner, that he has read the foregoing motion, and that the facts therein stated are true.

.....

Subscribed and sworn to before me, this ..... day of July, 1942.

.....

Notary Public, Dallas, County,
Texas.

No. 9962

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,
Appellants

v.

G. E. BURFORD, ET AL.,
Appellees

PETITION IN INTERVENTION OF REPUBLIC NATIONAL BANK OF DALLAS IN THE NATURE OF A PETITION FOR REHEARING

To The Honorable Circuit Court of Appeals:

Comes now Republic National Bank of Dallas (hereinafter called petitioner) and by leave of court files its petition in intervention, praying that the court grant a rehearing on the opinion delivered and the judgment entered herein on July 11, 1942, and

on such rehearing to affirm the judgment of the district court, and respectfully shows:

I.

The petitioner is a national banking association, organized and existing under the Acts of the Congress of the United States of America, and having its domicile and place of business in the City of Dallas, Dallas County, Texas.

II.

The petitioner has an interest in the outcome of this case and in the action of the court in granting appellants' second petition for rehearing, because, after the judgment of this court was entered on December 29, 1941, and after this court overruled the appellants' first petition for rehearing on February 2, 1942, the petitioner, on February 27, 1942, loaned to A. O. Phillips the sum of $90,000.00, upon a promissory note executed by the said Phillips, secured in part by a deed of trust lien upon the oil payment interest of the said A. O. Phillips in the property and the oil wells involved in this suit. The petitioner is the owner and holder of said note and the said lien securing the same. There is an unpaid balance of $84,931.09 on said note and an unpaid balance of $27,499.39 on said oil payment.

III.

The judgment of this court affirming the judgment of the district court was entered on December 29, 1941. The appellants' petition for rehearing was filed on January 17, 1942, and was overruled on February 2, 1942. The mandate of this court was issued on February 17, 1942, and was filed in the district court on February 19, 1942. The appellants' second petition for rehearing was not filed until May 27, 1942, and the judgment granting said second petition for rehearing and reversing the judgment of the district court was entered on July 11, 1942.

IV.

A rehearing should be granted on the opinion delivered and the judgment entered on July 11, 1942, and on such rehearing this court should affirm the judgment of the district court, on the following grounds:

(1) This court erred in holding that it had jurisdiction to grant the appellants' second petition for rehearing, because such petition for rehearing was filed more than three months after the appellants' first petition for rehearing was overruled and more than three months after the mandate had been issued.

(2) If this court had jurisdiction to grant appellants' second petition for rehearing, it abused its

discretion in granting such petition in this case, because such petition was not filed until more than three months after the appellants' first petition for rehearing was overruled and more than three months after the mandate had been issued, and in the meantime appellants had not shown the requisite diligence in that they failed to exercise their right to apply to the Supreme Court of the United States for writ of certiorari, but treated the judgment of this court as final, and permitted valuable property rights to be acquired by this petitioner in reliance upon this court's first judgment.

(3) This court erred in holding that the United States District Court is required to exercise an "independent judgment" in determining the validity of the Railroad Commission's order under the state law.

(4) If the district court should have exercised an independent judgment in determining the validity of the Railroad Commission's order under the state law, still the judgment of the district court should have been affirmed and not reversed, and this court erred in not so holding, because:

(a) The issue of the reasonableness of the Railroad Commission's order was developed by evidence heard originally in the district court, and not merely by evidence heard by the Railroad Commission.

(b) The district court did not refuse to pass on the issues of the state law, but expressly held that under the state law the order was valid.

(c) This court has already determined that the order of the Railroad Commission has reasonable support in the evidence, and, therefore, even by the tests laid down by this court in its second opinion, the district court was correct in refusing to issue an injunction against the enforcement of the Railroad Commission's order upon the ground of alleged invalidity of the order under the state law as well as upon the ground of alleged conflict with the Fourteenth Amendment.

(d) This record shows affirmatively that at the time of the promulgation of the Railroad Commission's order there existed facts that warranted fair and reasonable minds in arriving at the conclusion that the order was proper and necessary to prevent confiscation of private property.

(e) No question of the legal form or validity of the order on its face has been raised by the pleadings or evidence in this case, and the order on its face is valid and legal.

(f) The decision of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Company*, 161 S. W. (2d) 1022, does not require a reversal of this case, since the district court in this case heard original evidence and, based on the tests established by the Supreme Court of Texas, the record in this case shows that the order of the Railroad Commission is valid.

WHEREFORE, Republic National Bank of Dallas

respectfully prays that a rehearing be granted and that upon such rehearing the court set aside its judgment of July 11, 1942, and reinstate its judgment of December 29, 1941, that the judgment of the district court be affirmed, and for such other and further relief as shall be proper in the premises.

.....

Dallas, Texas
Attorney for Republic
National Bank of Dallas.

CERTIFICATE OF COUNSEL

I, LANHAM CROLEY, attorney of record for intervener Republic National Bank of Dallas in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness my hand, this ..... day of July, 1942.

.....

THE STATE OF TEXAS
COUNTY OF DALLAS

Before me, the undersigned authority, on this day personally appeared .....,
known to me, who, being by me duly sworn, upon his oath says that he is Vice-President of the petitioner,

Republic National Bank of Dallas, that he is duly authorized to make this affidavit for the said petitioner, that he has read the foregoing petition, and that the facts therein stated are true.

.....

Subscribed and sworn to before me, this ..... day of July, 1942.

.....

Notary Public, Dallas County, Texas.

CONSENT TO FILING OF PETITION IN INTERVENTION

Consent to the filing of the foregoing petition in intervention of Republic National Bank of Dallas

is given, this ..... day of July, 1942.

.....

Assistant Attorney General
Attorney for Railroad Commission of Texas and its Members.

.....

Attorney for G. E. Burford and X. Y. Z. Oil & Gas Company.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing motion for leave to file the petition in intervention, and of the petition in intervention in the nature of rehearing, of Republic National Bank of Dallas, is acknowledged, this ..... day of July, 1942.

.....
Attorney for Sun Oil Company

.....
Attorney for Magnolia
Petroleum Company

[fols. 437-472] APPELLANTS' THIRD PETITION FOR REHEARING—Filed August 1, 1942

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT

NO. 9962

SUN OIL COMPANY, ET AL.,

Appellants,

vs.

G. E. BURFORD, ET AL.,

Appellees.

APPELLANTS' THIRD PETITION FOR REHEARING

TO THE HONORABLE COURT:

Sun Oil Company and Magnolia Petroleum Company, appellants in the above entitled and numbered cause, petition the court to grant a rehearing on the opinion delivered and judgment entered herein on July 11, 1942, and on such rehearing to let stand that part of judgment which reverses the trial court's judgment but set aside that part of the judgment which remands the cause to the trial court, and to render

judgment for appellants in accordance with the prayer in appellants' brief, and as grounds respectfully show:

1.

The trial court erred in rendering judgment against appellants, dismissing the action and refusing to cancel the permits and enjoin drilling and operation of the locations involved, because on the undisputed evidence and as a matter of law the 2.33 acres was voluntarily subdivided from adjoining lands in such a way that it could not be separately developed in compliance with the spacing rule in existence at the time, or any subsequent rule, "to prevent confiscation of property," the sole ground on which it was granted, there being no evidence that the west 52.33 acres of the Fuller tract from which it was subdivided in derogation of the rule needed more wells for such purpose, the application not having been presented or decided on that basis, and notice of hearing not having been given to all who would have been entitled to notice on that basis, and the undisputed evidence having shown that the west 52.33 acres was protected from drainage; and by reason thereof this court erred in failing to render judgment for appellants.

2.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits involved and enjoin the drilling and operation of the wells, because on the undisputed evidence and as a matter of law the judgment for appellants in Cause No. 54769 (consolidated with No. 54743) is **res adjudicata** of the permits

here involved; and by reason thereof this court erred in failing to render judgment for appellants.

3.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits and enjoin drilling and operation of the well locations involved, because on the undisputed evidence the pendency of Cause No. 53915 deprived the Railroad Commission of jurisdiction to grant said permits; and by reason thereof this court erred in failing to render judgment for appellants.

4.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits and enjoin drilling and operation of the locations involved, because as a matter of law there was no substantial evidence of a necessity for four locations, or more than one, to be drilled on said 2.33 acres, considered separately, to prevent confiscation of property, and the undisputed evidence shows that one well will produce more than the oil under the 2.33 acres, and as a matter of law the permits for four wells were arbitrarily granted, without authority in the State law, and deprive appellants of equal protection of the law and deprive them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and Section 17 of Article I of the Constitution of Texas; and by reason thereof this court erred in failing to render judgment for appellants.

5.

The trial court erred in rendering judgment against appellants refusing the alternative relief requested by them for an injunction against the production of oil from the wells in controversy until the Railroad Commission shall, after due notice and hearing, enter an order so adjusting the allowable production from the wells on the 2.33 acres that the total daily allowable from the wells thereon shall not bear a greater proportion to the total daily allowable fixed by the Commission for the wells on the remainder of the Fuller 100 acre tract than the oil reserves in place under the 2.33 acres bear to the oil reserves in place under the remainder of the Fuller 100 acre tract; and by reason thereof this court erred in failing to render judgment for appellants.

6.

The trial court erred in its finding of fact No. V to the effect that the conditions have so changed since the granting of the Hammonds permit for well No. 1 on the strip that the judgment in Cause No. 54769 is not **res adjudicata** of the permits in the case at bar; and this court erred in not so holding and in failing to render judgment for appellants.

7.

The trial court erred in concluding and holding that the challenged order of the Railroad Commission does not violate any of the rights of plaintiff or intervener under the Fourteenth Amendment to the Constitution

of the United States; and this court erred in not so holding and in failing to render judgment for appellants.

WHEREFORE, appellants pray that a rehearing be granted, and that upon such rehearing that part of the judgment which reverses the trial court's judgment be not disturbed, but that part of the judgment which remands the cause to the trial court be set aside, and that judgment be here rendered for appellants in accordance with the prayer in their brief.

Respectfully submitted,

GREENWOOD, MOODY & ROBERTSON
J. B. ROBERTSON
Austin, Texas
Attorneys for Magnolia
Petroleum Company.
T. L. FOSTER
MARTIN A. ROW
Dallas, Texas
POWELL, RAUHUT & GIDEON
J. A. RAUHUT
Austin, Texas
Attorneys for Sun Oil Company.

I, J. A. Rauhut, an attorney of record for appellant Sun Oil Company in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness my hand, this 30th day of July, 1942.

J. A. RAUHUT.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Petition for Rehearing is acknowledged, this the ..... day of July, 1942.

.....

Attorney for Appellees G. E. Burford and XYZ Oil & Gas Company

.....

Attorney for Appellees Railroad Commission of Texas and its Members

[fols. 473-480] APPELLANTS' REPLY TO MOTION OF REPUBLIC NATIONAL BANK OF DALLAS FOR LEAVE TO INTERVENE AND REPLY TO PETITION IN INTERVENTION IN THE NATURE OF A PETITION FOR REHEARING—Filed August 6, 1942

NO. 9962

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,
Appellants,

vs.

G. E. BURFORD, ET AL.,
Appellees.

APPELLANTS' REPLY TO MOTION OF REPUBLIC NATIONAL BANK OF DALLAS FOR LEAVE TO INTERVENE

TO THE HONORABLE COURT:

Appellants oppose the motion of Republic National Bank of Dallas for leave to intervene for the following reasons:

1.

The Bank alleges (paragraph III, p. 2) that on February 27, 1942, it made a loan to A. O. Phillips and took a lien on an oil payment owned by Phillips, in the land

involved. Such date was only twenty-five days after the entry by this court of an order overruling appellants' first petition for rehearing, and neither the time for filing a petition for writ of certiorari nor the present term of this court had expired. The Bank was charged with knowledge of those facts on the date it claims to have acquired its alleged interest, and in law is presumed to have known that on February 27, 1942, the judgment of this court dated December 29, 1941, was subject to review by the Supreme Court of the United States, and also continued to be within the jurisdiction of this court. The allegations of the motion for leave to intervene are insufficient on their face to establish the Bank's claim (paragraph VI, p. 4) that "in making said loan and in accepting said security therefor, petitioner (Bank) relied upon what it in good faith believed to be the final action of this court in overruling the appellants' first petition for rehearing."

2.

The motion does not show that the Bank is not fully secured in the payment of all sums due it by its lien on other property and by the personal liability of the makers of the note.

3.

Even if the Bank owns the interest it claims to have acquired pendente lite, it voluntarily took same subject to the outcome of this suit, and the Bank apparently was satisfied to rely upon appellees to present any

issues affecting the interest so acquired. The Bank does not claim that appellees have no remaining interest and does not seek to be substituted for any party. All necessary parties are before the court and no reason is apparent why the Bank should be permitted to intervene and multiply the costs of litigation. Comparison of the grounds for rehearing asserted by the Bank shows that it has merely adopted the grounds asserted by appellees. Thus, clearly such interest as the Bank has, if any, is adequately represented by appellees, just as the Bank apparently assumed it would be when it allegedly acquired an interest pendente lite.

4.

Even if the Bank showed any equity, which is denied, this could not operate to give appellees any greater right than they had before and, therefore, furnishes no basis for an order granting appellees a rehearing.

5.

Appellants have no knowledge of the interest which the Bank claims to have acquired pendente lite, and this court of appellate jurisdiction only is not the proper forum in which to determine the existence or effect of legal or equitable claims alleged by the Bank to have been acquired by it while this appeal was pending in this court.

WHEREFORE, appellants pray that said motion of Republic National Bank of Dallas for leave to file

petition in intervention in the nature of a petition for rehearing be overruled, and for their costs.

GREENWOOD, MOODY & ROBERTSON
J. B. ROBERTSON
Austin, Texas
Attorneys for Magnolia
Petroleum Company
T. L. FOSTER
MARTIN A. ROW
Dallas, Texas
POWELL, RAUHUT & GIDEON
J. A. RAUHUT
Austin, Texas
Attorneys for Sun Oil Company.

No. 9962

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,
Appellants,

vs.

G. E. BURFORD, ET AL.,
Appellees.

APPELLANTS' REPLY TO PETITION IN INTERVENTION IN THE NATURE OF A PETITION FOR REHEARING PRESENTED BY REPUBLIC NATIONAL BANK OF DALLAS

TO THE HONORABLE COURT:

Without waiving their objections to the motion of Republic National Bank of Dallas for leave to intervene, but subject to same, appellants reply to the

Bank's petition in intervention in the nature of a petition for rehearing, as follows:

1.

Appellants are without knowledge of the allegations contained in paragraph II thereof and demand strict proof.

2.

Appellants deny the allegation in paragraph IV(2) that this court abused its discretion in granting appellants' second petition for rehearing and deny that appellants had not shown the requisite diligence but treated the judgment of this court as final and permitted valuable property rights to be acquired by said Bank in reliance upon this court's first judgment.

3.

This court had jurisdiction to grant appellants' second petition for rehearing for the reasons stated therein and because of the reasons and authorities asserted in Appellants' Memorandum in Support of Appellants' Second Petition for Rehearing and Reply to Appellees' Opposition Thereto. Appellants promptly and diligently filed their second petition for rehearing after the decision of this court in its Cause No. 9729 styled Selby Oil & Gas Company, et al. vs. Railroad Commission, et al., filed May 13, 1942, and within the

same term of court as the original decision in this cause.

4.

As a matter of law, on the undisputed facts in the record, the trial court erroneously decided the issues of State law involved in this case, for all the reasons fully shown in Brief for Appellants and Supplemental Brief for Appellants. Therefore, its judgment should not be affirmed and was properly reversed by this court.

WHEREFORE, appellants pray that said petition in intervention in the nature of a petition for rehearing be denied.

GREENWOOD, MOODY & ROBERTSON
J. B. ROBERTSON
Austin, Texas
Attorneys for Magnolia
Petroleum Company

T. L. FOSTER
MARTIN A. ROW
Dallas, Texas

POWELL, RAUHUT & GIDEON
J. A. RAUHUT
Austin, Texas
Attorneys for Sun Oil Company.

ACKNOWLEDGMENT OF SERVICE

Service of Appellants' Reply to Motion of Republic National Bank of Dallas for Leave to Intervene, and Reply to its Petition in Intervention in the Nature of a Petition for Rehearing is acknowledged this ..... day of August, 1942.

.....

Dallas, Texas
Attorney for Republic National
Bank of Dallas

.....

Attorney for Appellees G. E. Burford
and X Y Z Oil & Gas Company

.....

Attorney for Appellees Railroad
Commission of Texas and
its Members

[fol. 481] OPINION OF THE COURT ON MOTION OF REPUBLIC NATIONAL BANK OF DALLAS FOR LEAVE TO FILE PETITION IN INTERVENTION, ETC., AND DISSENTING OPINION OF JUDGE McCORD—Filed August 12, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9962

SUN OIL COMPANY, et al., Appellants,

versus

G. E. BURFORD, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

On Motion of Republic National Bank of Dallas for Leave to File Petition in Intervention in the Nature of a Petition for Rehearing

August 12, 1942

Before Holmes and McCord, Circuit Judges, and Dawkins, District Judge

HOLMES, Circuit Judge:

Less than a month after the first petition for rehearing in this case was denied, and the mandate sent down, the Republic National Bank of Dallas made a loan to A. O. Phillips secured by a deed of trust on some of the oil in place, the production from which is here in controversy. The bank now asks leave to intervene in this suit so that it may file a petition in the nature of a petition for rehear-[fol. 482] ing, and obtain such relief as may be just. While it is incongruous to seek a rehearing on behalf of one who was not a party to any prior hearing, we have considered the bank's motion on its merits.

At the time the bank made its loan neither the term of court nor the time allowed to grant certiorari had expired, and it had no right to rely on the finality of our decision; but, if it did, it has not been prejudiced by the setting aside of our first, and the entry of our second, judgment. The

affirmance merely upheld the judgment of the district court, wherein its jurisdiction had been sustained, the prayer for an injunction denied, and the plaintiffs relegated to the state courts upon all issues other than those under the federal constitution.

On appellants' second petition for rehearing, during the same term, we set aside the judgment of affirmance and remanded the entire cause to the district court for a new trial, merely restating at greater length the law of the case. We withdrew no part of our former opinion except that part which relegated state issues to the state courts, and even that prior ruling was qualified, as follows: "Unless and until the court of last resort of the state has decided that an 'independent judgment' as to reasonableness should be exercised by the [state] courts."[1]

The supervening decision of the Supreme Court of Texas, holding that the state courts might exercise such independent judgment, made it necessary for us to hold in our second opinion that the federal courts might decide such issues arising under the laws of the state. This was for the reason that prior to that time we deemed the particular point unsettled by Texas decisions, and were in doubt as to the state law on the subject.[2]

[fol. 483] When the bank made its loan, if it was relying on our judgment of affirmance, it was presumed to know that the judgment of the district court in this case left the plaintiffs free to pursue in the state courts whatever rights the state statutes afforded them.[3]

Without waiving their objections to the motion of the bank for leave to intervene, the appellants have filed a reply thereto, traversing some, and claiming to be without knowledge of, other parts thereof. We agree with appellants that, even if the bank owns the interest it claims to have acquired, it voluntarily took the same subject to the outcome of this suit, and was apparently satisfied to rely upon appellees to present any issues affecting the interest so acquired. The bank does not claim that appellees have no

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[1] 124 F. (2) 470, 471.

[2] Railroad Commission of Texas, et al. v. Rowan & Nichols, 310 U. S. 573, 311 U. S. 570, 615; Railroad Commission of Texas, et al. v. Pullman Company, et al., 312 U. S. 496.

[3] Transcript of Record, p. 92.

remaining interest, and does not seek to be substituted in place of any party. Comparison of the grounds for rehearing asserted by the bank shows that it has merely adopted the grounds asserted by the appellees.

No one may acquire a vested interest in a decision until the time has elapsed in which the court has jurisdiction to change it. To uphold appellees' contention would deprive this court of part of its jurisdiction, since, in granting the second petition for rehearing during the same term of court, we held that such jurisdiction existed to prevent an injustice.[4]

The effect of our first decision was to decide the federal constitutional question and relegate issues arising under state law to the state courts; our present decision remands those issues to the court below; and, since the case had to go back to the district court for retrial, we thought it best to let the trial be anew in its entirety. When the [fol. 484] bank made its loan it did so with the knowledge that the state court might decide adversely to those interests to which it was advancing credit. The effect of granting the rehearing and remanding the case was to leave open upon their merits all issues presented by the pleadings. No one may acquire a property right to have a cause tried in the state court rather than in the federal court.

The motion of the bank for leave to file its petition is overruled.

McCord, Circuit Judge, Dissenting:

I concurred in the opinions elaborating upon the principles of law to be applied in Federal Courts in cases involving orders and regulations of the Texas Railroad Commission. *Sun Oil Co. v. Burford*, 124 F. 2d 467, and opinion on Appellants' Second Petition for Rehearing, July 11, 1942, — F. 2d —. However, in my special concurrence to the opinion of July 11, 1942, I expressed doubt that the court

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[4] See our rule 32, which implies that a mandate once issued may, during the term, be recalled to prevent injustice; also our rule 29, which implies that, after twenty-one days from date of judgment, a petition for rehearing may, during the term, be presented by special leave of court or of one of the judges.

had the right to reopen the case and grant a new trial "after the lapse of such a great length of time, after the time allowed for filing petition for certiorari has expired." I reiterate the doubt there expressed. I am of opinion that Appellants' Second Petition for Rehearing came too late and should not have been granted.

I respectfully dissent.

[fol. 485] ORDER ON MOTION OF REPUBLIC NATIONAL BANK FOR LEAVE TO INTERVENE

Extract from the Minutes of August 12th, 1942

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

It is ordered by the Court that the motion of Republic National Bank of Dallas for leave to file petition in intervention in the nature of a petition for rehearing filed in this cause be, and the same is hereby, denied.

"McCord, Circuit Judge, dissents."

[fol. 486] ORDER DENYING APPELLEES' PETITION FOR REHEARING

Extract from the Minutes of August 13th, 1942

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

It is ordered by the Court that Appellees' petition for rehearing, filed in this cause be, and the same is hereby, denied.

[fol. 487] ORDER DENYING APPELLANTS' THIRD PETITION FOR REHEARING

Extract from the Minutes of August 13th, 1942

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

It is ordered by the Court that Appellants' Third Petition for Rehearing filed in this cause be, and the same is hereby, denied.

[fol. 488] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 489] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 495

ORDER ALLOWING CERTIORARI—Filed December 14, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 490] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 496

ORDER ALLOWING CERTIORARI—Filed January 18, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,

Petitioners,

vs.

SUN OIL COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Attorney General of Texas;
ED ROY SIMMONS,
Assistant Attorney General,
Counsel for Petitioners, the Railroad Commission of Texas and Its Members.
F. L. KUYKENDALL,
JAMES P. HART,
Counsel for Petitioners, G. E. Burford and X. Y. Z. Oil & Gas Company.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,

Petitioners,

vs.

SUN OIL COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas, and Ernest O. Thompson, Olin Culberson, and Beauford H. Jester, members of the Railroad Commission of Texas, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above case on July 11, 1942, granting a second petition for rehearing by the appellants, Sun Oil Company, et al., and setting aside a prior judgment of said court entered on December 29, 1941, and reversing the judgment of the District Court of the United

States for the Western District of Texas. These petitioners' petition for rehearing was denied by said Circuit Court of Appeals on August 13, 1942.

Opinions Below.

No formal opinion was written by the District Court, but findings of fact and conclusions of law were filed (R. 88-92). Three opinions have been written by the Circuit Court of Appeals. On December 29, 1941, the Court wrote a unanimous opinion affirming the judgment of the District Court, which opinion is reported in 124 F. (2d) 467. The first petition for rehearing filed by the appellants, Sun Oil Company, et al., was overruled without opinion on February 2, 1942 (R. 421). The appellants, Sun Oil Company, et al., filed a second petition for rehearing on June 1, 1942, (R. 421) and on July 11, 1942, the Court wrote an opinion granting the second petition for rehearing, setting aside its former judgment, and reversing the judgment of the District Court (R. 429). Judge McCord wrote a special concurring opinion (R. 440). These opinions are reported in 130 F. (2d) 10, 18. On August 12, 1942, the Court wrote an opinion denying the motion of Republic National Bank of Dallas for leave to file a petition in intervention in the nature of a petition for rehearing (R. 474). Judge McCord dissented from this opinion (R. 476). These opinions are reported in 130 F. (2d) 18, 19.

Jurisdiction.

The judgment to be reviewed was entered on July 11, 1942 (R. 440), and these petitioners' petition for rehearing was denied on August 13, 1942 (R. 477). The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347).

Questions Presented.

1. Whether the Circuit Court of Appeals had jurisdiction to grant the second petition for rehearing filed by the appellants, Sun Oil Company, et al., on June 1, 1942, to set aside the judgment theretofore entered by the Court on December 29, 1941, since said second petition for rehearing was filed more than three months after the said appellants' first petition for rehearing was denied, more than three months after the mandate had issued, and nearly one month after the expiration of the period fixed by statute for applying to the Supreme Court of the United States for a writ of certiorari.

2. If the Circuit Court of Appeals had jurisdiction to entertain the second petition for rehearing filed by Sun Oil Company, et al., on June 1, 1942, whether the Circuit Court of Appeals abused its discretion in granting said petition, and in setting aside its former judgment entered December 29, 1941, since said second petition for rehearing presented no new issues of fact or law and since said appellants, Sun Oil Company, et al., had not shown the proper diligence in that they had failed to exercise their right to petition the Supreme Court of the United States for a writ of certiorari.

3. Whether the Circuit Court of Appeals erred in holding that the United States District Court, in determining the validity under the Texas law of an order of the Railroad Commission of Texas granting a permit to drill four oil wells, must exercise an "independent judgment" in determining whether there existed facts that warranted the conclusion that the order was proper and necessary to prevent the waste of public resources or confiscation of private property.

4. Whether the Circuit Court of Appeals erred in reversing the judgment of the District Court and in remanding the case for a new trial, since the District Court upon original and sufficient evidence decided all issues of fact and of State law in favor of the validity of the Railroad Commission's order.

The Facts.

This suit was brought by Sun Oil Company, a New Jersey corporation, against G. E. Burford and the Railroad Commission of Texas and its members, and X.Y.Z. Oil & Gas Company, an Oklahoma corporation, to set aside and nullify an order entered by the Railroad Commission permitting Burford to drill four oil wells upon his 2.33 acre lease in the East Texas Oil Field and to enjoin the drilling and production of oil from such wells. In the alternative, it was prayed that production from these wells be enjoined until the Railroad Commission should restrict the production from such wells to an amount in proportion to the acreage of said lease (R. 29). Jurisdiction was alleged by reason of diversity of citizenship and also because of plaintiff's claim that the Railroad Commission's order violated its property rights under the 14th Amendment to the Constitution of the United States. Magnolia Petroleum Company, a Texas corporation, was permitted to intervene as a plaintiff alleging that the Railroad Commission's order violated its property rights under the 14th Amendment. Both the plaintiff and the intervener attacked the validity of the Railroad Commission's order under the state law, under the provisions of Article 6049c, sec. 8, Vernon's Annotated Texas Civil Statutes,* as well as under the Federal Constitution.

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* This statute reads as follows:

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof,

The case was tried by the District Judge without a jury. The evidence included the transcripts of the testimony taken at the three hearings before the Railroad Commission (R. 233-343) and also original evidence relating to the reasonableness of the Railroad Commission's order (R. 343-399).

The evidence showed that the permittee, G. E. Burford, was the owner of an oil and gas lease on a narrow strip of land containing 2.33 acres in the East Texas Oil Field. Prior to the granting of the permit under attack, no wells had been drilled on Burford's lease. Sun Oil Company owns a 50 acre lease immediately West of Burford's tract, on which it has drilled seven wells, and Magnolia Petroleum Company owns a 50 acre lease immediately East of Burford's tract, on which it has drilled five wells. The wells drilled by Sun Oil Company and Magnolia Petroleum Company, prior to the Railroad Commission's hearing in 1938, had already produced about 5,000 barrels of oil per acre, or about 250,000 barrels from each lease (R. 347). Because of the location of these leases in the extreme Eastern portion of the East Texas Oil Field, all of this oil had been replaced by oil migrating from other leases (R. 347). These wells on the Sun and Magnolia leases have drained and are still draining oil from Burford's lease (R. 243-245) as well as from other surrounding tracts. Without the wells granted by the Railroad Commission, Burford would

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including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

have no opportuntiy to recover the oil under his tract or its equivalent. Of the four wells drilled by Burford on his lease, one was a dry hole and another was a pumper which had not produced (R. 391).

At the conclusion of the evidence, the District Court entered judgment for the defendants, after announcing his opinion "that the issues of law and fact are with the defendants" (R. 87). The District Court also entered findings of fact and conclusions of law in which, after finding the facts in favor of the defendants, he concluded (1) "that the challenged order of the Railroad Commission of Texas does not violate any of the rights of the plaintiff or the intervener under the 14th Amendment to the Constitution of the United States" (R. 90), and (2) "that the various matters of state law raised present no federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction" (R. 91).

Upon appeal to the United States Circuit Court of Appeals for the Fifth Circuit that court (Judges Holmes, McCord, and Dawkins) on December 29, 1941, affirmed the judgment of the District Court. The unanimous opinion (124 F. (2d) 467) held (1) that the effect of the decisions of this Court in the two cases entitled *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, and 311 U. S. 570, was to relegate the parties to the state courts for decision of all questions of state law and, therefore, that these questions should not be decided by the federal courts and (2) that the record did not show "conditions amounting to a denial of Due Process or other violation of the Federal Constitution" (124 F. (2d) at p. 470).

A first petition for rehearing was filed by the appellants, Sun Oil Company, et al., on January 19, 1942 (R. 415). This first petition for rehearing was denied without opinion on February 2, 1942 (R. 421). No request for a stay of mandate was filed and on February 17, 1942, the mandate

was issued (R. 429). No attempt was made by the appellants, Sun Oil Company and Magnolia Petroleum Company, to take the case to the Supreme Court of the United States by certiorari or otherwise.

Nearly four months after the first petition for rehearing was denied and more than three months after the mandate was issued, Sun Oil Company and Magnolia Petroleum Company, on June 1, 1942, filed a second petition for rehearing (R. 421). This second petition for rehearing raised no new questions of law or fact, merely adopting the arguments therefore presented to the court in the first petition for rehearing, and asserting that the court's decision in this case was in conflict with its later decision in *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334, decided May 13, 1942 (Judges Hutcheson and Foster; Judge McCord dissenting).

Over the objections of the appellees that the second petition for rehearing was filed too late and was without merit (R. 423), the Circuit Court of Appeals on July 6, 1942, entered its order recalling its mandate and permitting the second petition for rehearing to be filed (R. 429). Thereafter, on July 11, 1942, the court set aside its former judgment, reversed the judgment of the District Court and remanded the case to the District Court for a new trial (R. 440). While not agreeing with the conclusion expressed in the majority opinion by Judge Hutcheson in the case of *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334, the court (with Judge McCord specially concurring) nevertheless held that its former judgment should be set aside, because, since the rendition of said judgment, the Supreme Court of Texas on March 11, 1942, had held in the case of *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022, that under the Texas statutes, the review of the Railroad Commission's order is strictly *de novo* and that in reviewing the reasonableness of the

Railroad Commission's order, the court should exercise its "independent judgment."

Disregarding the fact that the District Court had already passed on all questions of fact and of state law, upon original evidence, in favor of the validity of the Railroad Commission's order, and without discussing the sufficiency of the evidence to sustain the District Court's finding, the Circuit Court remanded the case for a new trial, in order that the District Court might, in its "independent judgment", determine "whether at the time of promulgation there existed facts that warranted fair and reasonable minds in arriving at the conclusion that the order was proper and necessary to prevent the waste of public resources or confiscation of private property" (130 F. (2d) at pp. 17, 18).

A first petition for rehearing was filed by appellees (petitioners here) and was denied by the court without opinion on August 13, 1942 (R. 477). A motion for leave to file a petition in intervention in the nature of a petition for rehearing was presented by Republic National Bank of Dallas, which had loaned $30,000.00 upon an oil payment in reliance upon the first judgment of the court (R. 447). This motion was denied on August 12, 1942 (R. 477). The opinion of the court (R. 474) was written by Judge Holmes (130 F. (2d) at p. 18). Judge McCord dissented upon the ground that "the Appellants' Second Petition for Rehearing came too late and should not have been granted" (R. 476, 130 F. (2d) at p. 19).

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that it had jurisdiction to grant the appellants' second petition for rehearing and to set aside the judgment entered December 29, 1941, when said second petition for rehearing was filed more than three months after

the first petition for rehearing was denied, more than three months after the mandate had been issued, and more than three weeks after the expiration of the period fixed by statute for applying to the Supreme Court of the United States for a writ of certiorari.

2. In holding that it should grant the appellants' second petition for rehearing when the appellants had not shown any diligence in attempting to secure a review of the judgment entered December 29, 1941, in that they failed to exercise their right to petition the Supreme Court of the United States for a writ of certiorari to review said judgment.

3. In holding that the United States District Court must determine the validity under the Texas Law of an order of the Railroad Commission of Texas granting a permit to drill four oil wells by the exercise of the court's "independent judgment" on the question of whether the facts warranted the conclusion that the administrative order was proper and necessary to prevent the waste of public resources or the confiscation of private property.

4. In reversing the judgment of the District Court and in remanding the case for a new trial, since the District Court, upon original and sufficient evidence, decided all issues of fact and of state law in favor of the validity of the Railroad Commission's order.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals in entertaining and granting a second petition for rehearing, which was filed after the time had expired for applying for a writ of certiorari, has decided an important question of Federal law which has not been, but should be, settled by this Court.

The Circuit Court of Appeals' first judgment was entered December 29, 1941; the appellants' first petition for rehearing was denied February 2, 1942; no motion for a stay was

filed and the mandate was issued February 17, 1942. Nothing further was done by appellants until their second petition for rehearing was filed on June 1, 1942. This second petition for rehearing set up no new questions of law or fact, but merely incorporated by reference the contentions made in the first petition for rehearing.

There is no provision contained in the rules of the Circuit Court of Appeals for a second petition for rehearing. Previously that court had stated that its rules did not contemplate the filing or consideration of second petitions for rehearing, particularly where such petitions presented no new questions not previously raised. See *City of Stuart* v. *Green*, 91 F. (2d) 603, 606.

After the first petition for rehearing was denied on February 2, 1942, the appellants had three months within which they could seek a review by this Court of the judgment of the Circuit Court of Appeals by a petition for a writ of certiorari. 28 U. S. Code, sec. 350. This time expired on May 2, 1942. From February 2, 1942, to June 1, 1942, the appellants had taken no action of any character whatever to stay or to review the judgment entered December 29, 1941. Upon the expiration of the time fixed by statute for review by this Court, the Circuit Court of Appeals' judgment became final and the Circuit Court of Appeals had no power thereafter to permit the filing of a second petition for rehearing.

The holding of the Circuit Court of Appeals that it retained jurisdiction to entertain and grant the appellants' second petition for rehearing is based on the purely technical conception of the term of court. The statute (Judicial Code, section 126; 28 U. S. C., section 223) and the rules of the Circuit Court of Appeals do not fix the length of the terms of court, but merely provide that a session of the court shall be held annually at the places named, including one session at the City of Fort Worth, Texas, beginning

on the first Monday in November. (Rule 3, United States Circuit Court of Appeals for the Fifth Circuit.) The Court apparently construes the statute and its rule to mean that each term lasts for one year, and the effect of the holding is that the Circuit Court of Appeals retains jurisdiction to entertain a petition for rehearing filed at any time during the term at which the judgment is rendered. Regardless of the fact that the time for applying for a writ of certiorari to this court has expired, no judgment can be considered final under the holding of the Circuit Court of Appeals until the expiration of the term of court. Since the terms of court apparently last for one year each, it may be as much as eleven months or longer after a judgment is rendered and a first petition for rehearing is overruled, before the term expires and the judgment can be considered final.

The evident intention of Congress in passing Section 350 of Title 28, United States Code, limiting the time within which a petition for certiorari may be filed for review of a judgment of the Circuit Court of Appeals to three months after the judgment was entered, was to fix a period of time within which the judgments of such courts might be considered final. The Supreme Court has no jurisdiction to review a decree of the Circuit Court of Appeals where the petition for certiorari is not filed until after the statutory period has expired. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399. It is contrary to every consideration of policy in favor of reasonably prompt termination of litigation to permit a party to wait until this period has expired and then to reopen the case by filing a second petition for rehearing in the Circuit Court of Appeals. The period for filing a petition for rehearing should certainly be no longer than the period allowed by statute for review in this Court.

This question has not been settled by any decision of this Court. The only cases cited by the Circuit Court of Appeals

to sustain its holding do not relate to the question of the jurisdiction of that court to entertain a petition for rehearing after the time for review in this Court has expired. *Henderson* v. *Carbondale Coal & Coke Co.*, 140 U. S. 25; *Thomsen* v. *Cayser*, 243 U. S. 66. In the first case the petition for rehearing was promptly filed. In the second case, the opinion does not disclose when the petition was filed, and no point was raised or discussed about the time when it was filed.

In this connection, we respectfully direct the Court's attention to the analogy of the limitation placed on motions for new trial in the District Courts under the Rules of Civil Procedure. Under Rule 6(c) the time for doing an act or taking any proceeding is not limited by the expiration of the term of court. Under Rule 59(b) the time in which a motion for new trial can be served cannot extend beyond "the expiration of the time for appeal." It is submitted that the same principles apply to this case. The term of court has no logical connection with the time for filing a petition for rehearing, and in any event the court entering a judgment should not be permitted to entertain and grant a petition for rehearing and set aside its judgment after the time for review in the appellate court has expired.

2. In holding that upon a new trial the District Court should exercise its "independent judgment" in determining whether the Railroad Commission's order is valid under the state law, the Circuit Court of Appeals decided a federal question in a way probably in conflict with applicable decisions of this Court.

The District Judge who tried this case is the same District Judge who tried the first *Rowan & Nichols Case*, 310 U. S. 573, and was a member of the three-judge court which tried the second *Rowan & Nichols Case*, 311 U. S. 570. The

record in this case shows that the District Judge conscientiously followed this Court's opinions in the *Rowan & Nichols Cases*. After holding that the Railroad Commission's order "does not violate any of the rights of the plaintiff or the intervener under the 14th Amendment to the Constitution of the United States" (R. 90), the District Judge then held that "various matters of state law raised present no federal question and further present no matters of such merit as to warrant the issuance of an injunction" (R. 91). The District Judge construed the *Rowan & Nichols Cases* to hold that in "oil regulation cases" relief by injunction in the Federal Courts should not be granted "unless some condition is uncovered more extreme than those on which the courts have heretofore felt warranted in acting" (R. 91). Since such conditions were not found to exist in this case, the District Court denied relief.

The Circuit Court of Appeals in its first opinion approved the holding of the District Court that the evidence did not show any violation of the appellants' rights under the 14th Amendment (124 F. (2d) at p. 470). Although the District Court had expressly held that the various matters of state law presented were without merit (R. 91), the Circuit Court of Appeals misconstrued the District Court's action and held in effect that the District Court had refused to pass on the issues of state law (124 F. (2d) at p. 468). The Circuit Court of Appeals then approved the District Court's judgment in the following language (124 F. (2d) at p. 469):

> "In the absence of a clear showing of confiscation or lack of Due Process, such bodies should be left, at least by the Federal Courts, to deal with the situation, unless and until the court of last resort of the State has decided that an 'independent judgment' as to reasonableness should be exercised by the courts."

The Circuit Court of Appeals thus construed the opinions of this Court in the *Rowan & Nichols Cases* to mean that

the extent to which the Federal Court would inquire into the reasonableness of an administrative order of a state board depends upon the construction by the state court of the state statute providing for the review of the administrative board's order.

Thereafter, on May 13, 1942, the same Circuit Court of Appeals (but with Judges Hutcheson, Foster, and McCord composing the court) in another oil regulation case reached an entirely different conclusion as to the extent to which the Federal Court should pass on the reasonableness of an order of the Railroad Commission. *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334. In an opinion by Judge Hutcheson, from which Judge McCord dissented, it was held (1) that in cases of diversity of citizenship, the state review statute (Article 6049c, Sec. 8, Vernon's Annotated Texas Civil Statutes) presented a distinct "statutory suit" (128 F. (2d) at p. 335) in addition to the "constitutional suit", (2) that the rule stated by this court in the *Rowan & Nichols Cases* applied only to cases not involving diversity of citizenship (128 F. (2d) at pp. 336-337), (3) that in cases of diversity of citizenship, the Federal Courts should follow the state decisions and that, since the state decisions hold that in the "statutory suit" the court must exercise its "independent judgment" in determining "whether the order rests upon a reasonable basis", the District Court erred in not determining this "statutory suit" by the "rules established by the Texas court" (128 F. (2d) at p. 337). Judge McCord dissented upon the ground that the decision was in conflict with the *Rowan & Nichols Case* and also the recent decision by the same Circuit Court of Appeals in the present case (128 F. (2d) at p. 337).

On June 1, 1942, the appellants, Sun Oil Company, et al., filed their second petition for rehearing in this case, the sole ground being that the decision in the *Selby Case* was in

conflict with the decision theretofore rendered in the present case (R. 421).

In granting the second petition for rehearing in this case, the Circuit Court of Appeals stated that it did so "to avoid injustice to anyone from a conflict in our decisions" (130 F. (2d) at p. 13). However, Judge Holmes, in the majority opinion, refused to concur in the conclusion reached by Judge Hutcheson that there were two suits—a "constitutional suit" and a "statutory suit"—and held that there was "only one suit" (130 F. (2d) at p. 16). Nevertheless, the court set aside its former judgment, because it purported to find in the decision of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022 (rendered March 11, 1942), a declaration that in determining the reasonableness of the Railroad Commission's orders, the state courts must exercise their "independent judgment" (130 F. (2d) at p. 16). The Circuit Court of Appeals regarded this alleged clarification of the Texas law as being sufficient ground for setting aside its former judgment of affirmance and substituting a judgment reversing the judgment of the District Court and remanding the case for a new trial (R. 440).

Judge McCord specially concurred in a separate opinion, in which he doubted the right of the Circuit Court of Appeals to grant a rehearing "after the lapse of such great length of time," but agreed to the reversal in order that "the two cases (the *Selby Case* and this case) can on a new trial be determined in conformity with the decision of the Supreme Court of Texas, and the conflict which now exists in our two opinions may be obliterated" (R. 440). It is difficult to understand how the District Court could obliterate the conflicts in the opinions by the Circuit Court of Appeals in the present case and the *Selby Case*, when the Circuit Court of Appeals could not itself harmonize its own opinions.

In overruling the motion of Republic National Bank of Dallas to intervene, the majority of the court again stated that "the supervening decision of the Supreme Court of Texas, holding that the state courts might exercise such independent judgment, made it necessary for us to hold in our second opinion that the federal courts might decide such issues arising under the laws of the state. This was for the reason that prior to that time we deemed the particular point unsettled by Texas decisions, and were in doubt as to the state law on the subject" (130 F. (2d) at p. 19).

Judge McCord dissented from this opinion, his former doubts having become crystallized into the definite opinion "that the appellants' second petition for rehearing came too late and should not have been granted" (130 F. (2d) at p. 19).

The result of the three opinions in this case and the opinion in the *Selby Case* is to leave the applicable law in such confusion that it would be a practical impossibility for the District Judge to know how to try this case. The opinions of the Circuit Court of Appeals conflict with each other and all of them are in conflict with the law as laid down by this Court in the *Rowan & Nichols Cases.*

The effect of the opinion of the Circuit Court of Appeals in this case is that the Federal courts must go as far as the State courts would go in exercising an "independent judgment" in determining whether the order of the Railroad Commission is reasonable or not. Under the Texas decision relied upon by the Circuit Court of Appeals, *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022, it is held that "the doctrine that the administrative agency should take the testimony and make the findings of fact, and that the findings should be binding on the court, is foreign to the law of this state." (161 S. W. (2d), at p. 1028.) The Fed-

eral rule that the findings of a board, if supported by evidence, are conclusive, is repudiated in Texas. (161 S. W. (2d), at p. 1028.) Evidence must be taken anew in the court. (161 S. W. (2d), at p. 1029.) "Whether the agency heard sufficient evidence is not material. In fact, the evidence heard by the agency is not per se admissible upon the trial in the District Court." (161 S. W. (2d), at p. 1030.)

It is evident that the process which must be followed by the Texas courts under the decision of the Texas Supreme Court, in determining whether the order of the Railroad Commission is valid under the State law, is very different from the process to be followed by a Federal court in determining whether the order is valid under the 14th Amendment. Otherwise, there would have been no point in the Circuit Court of Appeals' action in reversing the judgment of the District Court, since the Circuit Court of Appeals in its first opinion had already held that the order was valid under the Federal Constitution. (124 F. (2d), at p. 470.) This part of its opinion has not been withdrawn by the Circuit Court of Appeals. (130 F. (2d), at p. 19.) The opinion of the Circuit Court of Appeals must mean, therefore, that it is incumbent upon the Federal court to determine the validity of the Railroad Commission's order under the State law by exercising an "independent judgment" upon the reasonableness of the order, disregarding any evidence that may have been heard by the Railroad Commission and any findings which it may have made upon such evidence, and determining for itself what constitutes "substantial evidence" to support the Commission's order.

It is submitted that this conclusion of the Circuit Court of Appeals is in direct conflict with the decisions by this Court in the *Rowan & Nichols cases*. In those cases, it was plainly stated that the Federal courts would go no further in testing the validity of an order of the Railroad Commis-

sion under the States statutes than they would in testing its validity under the Federal Constitution. This Court's language in the first *Rowan & Nichols case* is as follows (310 U. S., at p. 584):

> "What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and it is not foreclosed by the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the Federal courts."

In the second *Rowan & Nichols case*, this Court, in passing on the constitutional issue, said (311 U. S., at p. 346):

> "Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their *independent judgment* on such matters against that of the chosen state authorities." (Our emphasis.)

This Court further held that the District Court erred in striking down the order on the ground that it did not prorate production on a "reasonable basis" saying (311 U. S., at p. 577):

> "In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state courts, 311 U. S. 614."

In holding, as it has in this case, that the District Court must go beyond the inquiry which is necessary in order to test the validity of the Railroad Commission's order under the Due Process Clause and must follow the rule of the State courts and exercise its "independent judgment" on a trial *de novo* to determine the reasonableness of the order under

the State statute, the Circuit Court of Appeals has held contrary to the decisions of this Court just referred to.

3. In rendering conflicting decisions upon the same questions of law within a period of less than one month, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Circuit Court of Appeals (when Judges Hutcheson and Foster constituted the majority) held in *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334, that in cases involving diversity of citizenship, the Texas statute (Article 6049c, sec. 8, Vernon's Annotated Texas Civil Statutes) permitting appeals from orders of the Railroad Commission to be brought in "a Court of competent jurisdiction in Travis County" conferred on the Federal courts jurisdiction of a distinct "statutory suit." (124 F. (2d), at pp. 335-336.) The Circuit Court of Appeals in the present case in its opinion handed down July 11, 1942 (when Judges Holmes and Dawkins composed the majority), expressly stated their refusal to assent to the holding in the *Selby* case. (130 F. (2d), at p. 16.) Both the majority opinion (130 F. (2d), at p. 13) and the special concurring opinion by Judge McCord (130 F. (2d), at p. 18) recognize a direct conflict with the holding in the Selby case. We, therefore, have the situation where the decisions of the same Circuit Court of Appeals are in direct conflict with each other and there is no hope of resolving this conflict, except by an authoritative decision of this Court, since any two members of the Circuit Court of Appeals may constitute a majority and the decision of a particular case will depend on which two of the members of the Court happen to constitute the majority in such case.

4. Upon the record in this case the order of the Railroad Commission of Texas is valid and should be sustained. Before the order under attack was entered in 1939 (R. 31), Burford had no wells on his lease. In the meantime, beginning in 1932 (R. 263) Sun Oil Company had drilled seven wells on its lease and Magnolia Petroleum Company had drilled five wells on its lease, both of which adjoin the Burford lease (R. 399). These Sun and Magnolia wells have produced large quantities of oil (R. 347), part of which has been drained from beneath Burford's lease (R. 243-245). In fact, at the time of the hearing before the Railroad Commission in 1938, the Magnolia Petroleum Company (with only five wells on its lease) had already produced the equivalent of 100% of the oil originally in place beneath its lease (R. 286). All of this oil had been replaced by drainage from other leases (R. 286, 347). Because of the erratic underground conditions in the Eastern edge of the East Texas Oil Field, where the Burford tract is located, one of the Burford wells is a dry hole and the other is a pumper which has not produced (R. 390, 391). The Railroad Commission was amply justified in concluding that in order for Burford to have a fair opportunity to recover his share of the oil, he should be permitted to drill the wells for which the permit under attack was granted. Certainly there is no reason why a Federal court of equity should intervene and, by cancelling the Railroad Commission's order and enjoining production from Burford's wells, deprive Burford of all means of producing oil from his own lease.

Conclusion

This case presents important questions pertaining to the jurisdiction and practice of Federal courts, which should be settled by this Court in order to avoid the utmost con-

fusion which has arisen by virtue of the conflicting decisions of the Circuit Court of Appeals. For the reasons stated, therefore, it is respectfully submitted that this petition for a writ of certiorari be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

vs.

G. E. BURFORD, ET AL.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

vs.

G. E. BURFORD, ET AL.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Cross-petitioners, Sun Oil Company and Magnolia Petroleum Company, are respondents in the Petition for Writ of Certiorari which is being filed by the Railroad Commission of Texas, G. E. Burford, et al. The record being filed with the main petition is here adopted as the record in connection with this cross-petition. Cross-petitioners respectfully show:

A.

Opinions Below.

The first and second opinions of the Circuit Court of Appeals (R. 409, 429) are reported in 124 F. (2d) 467 and

130 F. (2d) 10. The third opinion (R. 474) has not been reported.

B.

Summary Statement of the Matter Involved.

Sun Oil Company, as plaintiff, filed this suit in the United States District Court, Western District of Texas, against G. F. Burford, X Y Z Oil & Gas Company, the Railroad Commission of Texas and its members, as defendants (R. 1). Magnolia Petroleum Company intervened with a similar complaint against the defendants (R. 34). Both complaints seek cancellation of orders of the Railroad Commission granting drilling permit for well locations described as Burford Nos. 1, 2, 3, and 4 on 2.33 acres, which in turn is a part of the W. L. Fuller 102.33 acre tract, Gregg County, Texas, East Texas Field; injunction against drilling and operation of the wells; and alternatively, for injunction against operation of the well locations until such time as the Railroad Commission shall, after due notice and hearing, enter an order so adjusting the allowable production of said locations that the total daily production from the 2.33 acres shall not bear a greater proportion to the total daily allowable fixed by the Commission for wells on the remainder of the Fuller tract than the oil reserves under the 2.33 acres bear to the oil reserves under the remainder of the Fuller tract (R. 29, 40).

X Y Z Oil & Gas Company is an assignee of Burford (R. 28, 212).

Jurisdiction was asserted on grounds of diversity of citizenship and Federal questions (R. 2) and found to exist on both grounds (R. 88-9, 90). Such a suit is expressly authorized by state statute. Acts 1935, 44th Leg., p. 180, Ch. 76, Sec. 14 (Ver. Tex. Stats. 1936, Art. 6049c, Sec. 8, Appendix, pp. 26-27).

The orders in controversy were granted as exceptions to the Commission's well spacing rule for the East Texas Field, which rule was adopted pursuant to powers granted by the Texas oil and gas conservation statutes (Acts 1919, p. 285; Acts 1931, 42nd Leg., 1st C. S., p. 46, Ch. 26, Secs. 1, 15; Acts 1932, 42nd Leg., 4th C. S., p. 3, Ch. 2, Secs. 1, 7; Acts 1935, 44th Leg., p. 180, Ch. 76, Secs. 2, 4; Ver. Tex. Stats., 1936, Arts. 6014, 6029, Appendix, pp. 25-26), on findings that such general rule is necessary to prevent waste of oil and gas (R. 111-134). This rule provides in substance that no wells shall be drilled at lesser distances than 660 feet from other wells and 330 feet from property lines (i. e., ten acre spacing), "provided that the Commission in order to prevent waste, or to prevent the confiscation of property, will grant exceptions to permit drilling within shorter distances • • • whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent confiscation of property" (R. 132-3).

The four locations were granted solely on the ground of necessity to prevent confiscation of property (R. 30, 32, 153, 155), and are approximately 24 feet from the sides of the Burford strip (R. 104), referred to in exhibits as 2.21 acres, 2.4 acres, 2.81 acres, and 2.33 acres (R. 104, 138, 141, 168, 190)—a difference in surveying which is immaterial to the questions presented. Respondents call it 2.33 acres and we shall so describe it. Sun's 50 acre leasehold of the Fuller tract has seven wells and adjoins the Burford strip on the west (R. 18, 104). Magnolia's 50 acre leasehold of the Fuller tract has six wells and adjoins the Burford strip on the east (R. 18, 104).

In the district court cross-petitioners attacked the permit orders on the grounds indicated in the statement of Questions Presented, *infra*, pp. 5-7) (R. 20-1, 12-14, 22-3, 17-18, 19, 24-5); and their evidence to establish these grounds is undisputed, as hereinafter shown.

The judgment of the district court found the issues of law and fact with the defendants, and dismissed the complaints (R. 87-8).

Cross-petitioners presented each of the above grounds of complaint by appropriate assignments of error in the Circuit Court of Appeals. That court reversed and remanded the case for new trial (R. 439, 440) without adjudicating the merits, but cross-petitioners contend the record is such that final judgment for cross-petitioners should be entered on the undisputed evidence.

C.

Statement of the Basis upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

(a) Sec. 240 of the Judicial Code as amended by Act of February 13, 1925, Sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

(b) The judgment to be reviewed was entered July 11, 1942 (R. 429). On August 1, 1942, cross-petitioners timely filed their petition for rehearing on each of the grounds herein asserted (R. 460), which was entertained and overruled on August 13, 1942 (R. 478).

(c) The jurisdiction of this court is not affected by the remand, and this court may grant the writ to render final decree for cross-petitioners if the record is such that a final decree would be proper. *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 25 S. Ct. 493; *Spiller* v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 40 S. Ct. 466; *Wichita Roy. Co.* v. *City Natl. Bank of Wichita Falls*, 306 U. S. 103, 59 S. Ct. 420.

D.

Questions Presented.

1. Whether, in view of the undisputed evidence that the 2.33 acres was created by voluntary subdivision from a 52.33 acre tract capable of development as an entirety in compliance with the general well spacing rule, without an exception, the courts below should have applied the settled law of Texas that the Railroad Commission has no power under those circumstances to grant a permit under the clause "to prevent confiscation of property" (the sole ground on which the orders in controversy were granted), by rendering judgment for cross-petitioners.

2. Whether, under the undisputed evidence that cross-petitioners recovered a final judgment in the District Court of Travis County, Texas, in Cause No. 54769 (consolidated with No. 54743), canceling a prior permit order granted by the Railroad Commission on the same ground of exception as that in controversy in this suit, and on the same strip, to the predecessor in title of Burford and X Y Z Company, which predecessor and the Railroad Commission were defendants in said former suit, the courts below should have applied the settled law of Texas that such a judgment is *res adjudicata* that the Railroad Commission is without power to regrant a permit on such a strip on such ground of exception, by rendering judgment for cross-petitioners.

3. Whether, in view of the undisputed evidence that at the time the orders in controversy were entered there was pending in the District Court of Travis County, Texas, Cause No. 53915. between Sun and Magnolia as complainants and the Railroad Commission and the predecessor in title of Burford and X Y Z Company as defendants, to test the validity of, and to cancel, still another prior permit order, granted by the Railroad Commission on the same

strip and on the same ground of exception as those in controversy, the courts below should have applied the settled law of Texas that pendency of the suit to cancel the prior permit order deprived the Railroad Commission of jurisdiction to grant *pendente lite* another permit on the same tract, for which reason the Circuit Court of Appeals should have rendered judgment for cross-petitioners.

4. Whether, in view of the undisputed evidence that one well on the strip will produce more than the oil under it, the courts below should have applied the settled law of Texas that under such circumstances the Railroad Commission has no power to grant the tract additional wells under the exception clause "to prevent confiscation of property" (the sole ground on which the orders in controversy were issued), by rendering judgment for cross-petitioners; and whether the granting of four wells under such circumstances, in view of the undisputed evidence that the additional wells will cause great loss of recovery by cross-petitioners' wells, deprives cross-petitioners of equal protection of the law and of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

5. Whether, in view of the undisputed evidence that cross-petitioners offered to pool their adjoining leases, or either of them, with the Burford strip so that the owner of the latter will receive an equitable share in the production from the whole, and the further undisputed evidence that one well on the strip will produce more oil than the amount in place under it, and that four wells thereon will greatly reduce the amount of oil cross-petitioners' wells will recover due to the fact that each well in the area is allowed to produce an equal amount daily, regardless of reserves, cross-petitioners were entitled to rendition of a judgment by the courts below granting their alternative prayer that

the production of oil from the four wells in controversy be enjoined until the Commission shall, after due notice and hearing, so adjust the allowable production of wells on the strip that the total daily allowable therefrom shall not bear a greater proportion to the total daily allowable fixed by the Commission for the wells on the remainder of the Fuller 100 acre tract than the oil reserves in place under the strip bear to the oil reserves in place under the remainder of the Fuller 100 acres; and whether the granting of four wells on the strip under such circumstances, without making proper provision for the protection of cross-petitioners' properties by adjusting the allowables, exceeded the necessities of the case, and was so arbitrary, discriminatory and confiscatory as to cross-petitioners as to deny them equal protection of the law and deprive them of their property without due process of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

E.

The Facts.

The 2.33 acres was created by voluntary subdivision from the remainder of the Fuller 102.33 acres. (Area A-B-C-D on Exhibit 1—R. 104; R. 108, 109-110, 3-4). In December, 1930, Mamie Hammonds, owner of the lease on the entire tract, assigned the east 50 acres to persons who subsequently assigned to Magnolia; and in February, 1931, she assigned the west 50 acres to Sun Oil Company, thus leaving in between the strip 49 feet in width. (Stipulation, R. 109-10, referring to allegations in the Complaint, R. 3-4).

When this subdivision was made, the Commission's spacing rule provided that no wells shall be drilled less than 150 feet from property lines or less than 300 feet from other well locations (R. 111). By amendments these requirements were later increased to a minimum of 330 feet from

property lines and 660 feet from other wells (R. 112-134). The Railroad Commission's general order of May 29, 1934, provides that in applying the spacing rule no subdivision of property made subsequent to adoption of the original rule shall be considered in determining whether any property is being confiscated within the terms of the rule (Allegations of Complaint, R. 8-9, undenied by answers, R. 41, 45, 49).

Nevertheless, Burford's application for permit was to drill four wells *on the 2.33 acres* ("Form 1," R. 138, and accompanying plat, R. 141; and his second application, R. 147, 150); and the notices of hearing thereon likewise recognize that this was an application to drill on the strip separately—in other words, on the basis of the subdivision rather than on a disregard of it (R. 142, 152, 385). Only those operators having leases adjacent to the 2.33 acres were notified of the hearings, and such notice was not given to Amerada Petroleum Corporation, owner of a lease adjoining the land from which the strip was subdivided (R. 104, 142, 152, 385).

Following the first hearing, the Commission denied all four locations. Following the second hearing, it granted No. 2 on the ground of necessity to prevent confiscation of property, and denied Nos. 1, 3 and 4. Following the third hearing, it granted all four locations on the ground of necessity to prevent confiscation of property. But each of such orders expressly dealt with it as a 2.33 acre tract—granted permit on the basis of giving effect to the subdivision, rather than disregarding it (Complaint, paragraph 5, R. 10-12, admitted by the answers; R. 153, 30; 155, 31-2; 161).

Both tracts created by the *original* subdivision of the Fuller tract—i. e., the east 50 acres and the west 52.33 acres—were sufficiently large to be drilled in compliance with the spacing rule then in existence; but of the tracts

created by the *second* subdivision—i. e., the west 50 acres and the middle 2.33 acres—only the west 50 acres was sufficiently large, and the 2.33 acre strip was too narrow to comply with the rule (R. 104).

Undisputed testimony was offered on the trial that the west 52.33 acres, without Burford locations Nos. 1 to 4, was reasonably protected from drainage and will recover its recoverable oil with the wells already drilled (R. 367-8).

On October 11, 1934, long before the strip was assigned to Burford and X Y Z Company, the Commission granted Mamie Hammonds permit to drill on this same strip (R. 163) on *both* grounds of exception to the spacing rule (R. 190-1); and in Cause No. 54769 (consolidated with No. 54743), District Court of Travis County, Texas, cross-petitioners obtained a final judgment (R. 185) against the Railroad Commission, Hammonds and others (predecessors of Burford and X Y Z Company—R. 212), canceling the permit order on allegations that it was granted in violation of the spacing rule and that the strip was not entitled to development as a separate tract (R. 164, 174-6).

Cross-petitioners urged the judgment as *res adjudicata* at the hearings before the Commission's examiner (R. 234-6, 296, 330-1), again in their motion for rehearing before the Commission (R. 157), and the Complaint expressly pleads the judgment as *res adjudicata;* that there has been no such change of conditions as would entitle the strip to a permit; that the reservoir conditions under the strip were the same and bear the same relation to the reservoir conditions in the field generally as at the date of said judgment and date of the permit thereby canceled; and that the Burford locations are no more necessary than the location canceled by said judgment (R. 12-13).

On the trial of the instant case, undisputed testimony was offered to the effect that since the date of the Hammond permit, which was canceled in the suit just mentioned, there

had been no change of conditions requiring any of the well locations here involved to enable the west 52.33 acres of the Fuller tract to recover the equivalent of the oil under it or to protect it from drainage, and that such west 52.33 acres is as well protected from drainage and is recovering the oil through existing wells as efficiently as it was when this prior permit was granted (R. 375-6); and respondents' witness corroborated this on the trial (R. 395-6).

Cause No. 53915, styled Sun Oil Company *v.* Railroad Commission and Mamie Hammonds, in which Magnolia intervened, was pending in the District Court of Travis County for final trial at the time Burford's application was filed, heard and granted by the Railroad Commission (R. 205-6, 208). Said suit was for the purpose of canceling still another order granting Mamie Hammonds permit to drill on this same strip, and it was an issue in said suit that the strip, being a subdivision, was not entitled to be developed as a separate tract under the spacing rule (R. 192, 197-8, 203).

Cross-petitioners urged before the Railroad Commission that it had no jurisdiction of the Burford application because of the pendency of that suit (R. 157, 236-7, 238, 295, 331), and the complaint expressly asserts that the Commission was without jurisdiction on this ground and that the Burford permits are therefore void (R. 13-14). After the Commission had granted the Burford permits and this suit had been filed, Cause No. 53915 was disposed of by final judgment of the District Court of Travis County in November, 1939, annulling the Hammonds permit order there involved (R. 208).

It was shown that Burford did not contend he needed four wells to enable him to recover the eqivalent of the oil in place under the strip (R. 233-293, 294-317, 318-365), but that undisputed evidence at the hearing on his application showed one well on the strip would produce more oil

than there is under it (R. 362-3). The Commission's proration order allowed each well in the area to produce up to a flat 20 barrels per well daily, irrespective of the size of the tract or reserves in place (R. 370). Sun's 50-acre lease had seven wells and Magnolia's 50-acre lease had six wells (R. 18, 104, 141), from which it follows that the allowable of four wells on the 2.33 acres would be 4/7ths as great as the total allowable from Sun's 50 acres and 2/3rds as great as the total allowable of Magnolia's 50 acres; and this will result in drainage from the adjacent tracts (R. 349-350; 368-9). It is undisputed that with four wells on the strip, Sun would lose between 70,000 and 100,000 barrels of oil which its wells might otherwise have produced, valued at $1.10 per barrel (R. 369), and Magnolia's loss of oil to the Burford locations will be about 50% as much as Sun's loss (R. 377); that the four locations on the strip are each approximately 24 feet from cross-petitioners' leases, whereas cross-petitioners' nearest wells are roughly 330 feet from the strip (R. 104); that allowance of the Burford locations will make it necessary for Sun and Magnolia to drill additional wells "just to meet the offsets" (R. 368-9); that the high concentration of wells which would result would lower the pressure; reduce the flowing life, increase the operating expenses, and thereby cause loss to cross-petitioners (R. 371, 376-7). Cross petitioners expressly urged before the Commission that four wells on the strip as a separate tract were not necessary to give it an opportunity to produce the equivalent of the oil under it; that one well would give it a great advantage over cross-petitioners' leases, and four wells would confiscate their property without compensation and deny them due process of law and equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States (R. 158). Cross-petitioners tendered before the Commission (R. 158) and also in court (R. 19)

an offer to pool their leases with the strip for development as an entire tract in either of three ways: (a) the strip and the Sun lease; (b) the strip and the Magnolia lease; and (c) one-half of the strip with the Sun lease and one-half with the Magnolia; and under either method offered to share ratably the future production from the pooled property in proportion to the acreage so contributed by each owner, less deduction in the same proportion for future drilling and operating expenses.

Cross-petitioners, in the alternative, requested the Commission, in case it should hold that there is any reasonable basis for permitting the drilling of each or either of said four locations on the strip as a separate tract, to so adjust the allowable production of such locations as the Commission should decide to permit on the strip, and so condition the permit therefor, that the total daily allowable production from the 2.33-acre strip shall not exceed 2.33/100ths of the total daily allowable production for the remaining and adjoining 100 acres of the Fuller tract; and urged that such provision and condition would enable Burford to produce only his fair share of the oil in place (R. 159-60). The Commission denied all relief so requested by appellants (R. 161).

Undisputed testimony was offered on the trial that the granting of the alternative request for adjustment of allowable would have given Burford his share of the oil and would have lessened the drainage from cross-petitioners' leases (R. 370-1).

The Complaint expressly alleged that four wells are not needed to give the strip an opportunity to produce its share of the oil, that one well would give the strip more than its share, and the other injurious effects upon cross-petitioners resulting from granting four wells (R. 17-18, 21-23, 26-27); that the granting of four wells was in violation of the State law (R. 12); that they have no recourse for the value

of the oil and gas which will be drained from their property (R. 23); that the granting of four wells under those circumstances denies them equal protection of law and deprives them of their property without due process of law (R. 23); that if there was any basis for granting four wells, the order was nevertheless unreasonable, discriminatory, and confiscatory in the light of the allowable order, because the Commission could have adjusted the allowable, thereby materially lessening the injury to cross-petitioners, and the granting of the permits without such adjustment or other proper provision for the protection of their property exceeded the necessities of the case and is arbitrary, unreasonable, discriminatory, and confiscatory, violating their rights under the Fourteenth Amendment to the Constitution of the United States (R. 24-5).

F.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In failing to render judgment annulling the permit orders and granting injunctive relief ancillary thereto as prayed by cross-petitioners, on the undisputed evidence that the 2.33 acres was voluntarily subdivided from the west 50 acres in such way that it does not comply with the spacing rule, and that, disregarding the subdivision, the west 52.33 acres did not need additional wells to protect it from drainage, the law of the State being that under such circumstances the Commission has no power to grant permits on the strip "to prevent confiscation of property," the sole ground on which these permit orders were granted.

(2) In failing to render judgment annulling the permit orders and enjoining drilling and operation of the locations involved, because as a matter of State law, under the undis-

puted evidence, the judgment in Cause No. 54769 (consolidated with No. 54743) is *res adjudicata* against Burford's and X Y Z Company's claim of right to the permits here involved and against the Commission's claim of power to grant them.

(3) In failing to render judgment annulling the permit orders and granting ancillary injunctive relief, because under the law of the State the pendency of Cause No. 53915 in the District Court of Travis County, Texas, deprived the Railroad Commission *pendente lite* of jurisdiction to grant permits to Burford on the same tract there involved.

(4) In failing to render judgment annulling the permit orders and enjoining drilling and operation of the locations involved, because, if the strip may be lawfully considered as a separate tract, then as a matter of State law, the Commission's action in permitting four locations was arbitrary in view of the undisputed evidence that there is no necessity for four, or more than one, to give the owners of the strip an opportunity to recover the amount of oil in place or to prevent confiscation of their property, and that the drilling of four thereon will cause drainage of large quantities of cross-petitioners' oil and otherwise injure their property; the granting of four locations being without authority in the State law, and deprives cross-petitioners of equal protection of the law and of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(5) In failing to render judgment granting cross-petitioners' alternative prayer for injunction against production of oil from the wells in controversy until the Railroad Commission shall, after due notice and hearing, enter an order so adjusting the allowable production from the wells on the 2.33 acres that the total daily allowable from the wells thereon shall not bear a greater proportion to the

total daily allowable fixed by the Commission for the wells on the remainder of the Fuller 100 acre tract than the oil reserves in place under the 2.33 acres bear to the oil reserves in place under the remainder of the Fuller 100 acre tract, under the undisputed evidence that one well would give the strip its full share of oil, that cross-petitioners had offered to pool, and that either such pooling or adjustment of allowables would afford the owners of the strip the amount of oil under it and at the same time would prevent or greatly reduce the drainage from cross-petitioners and other injuries which will otherwise occur; it appearing as a matter of law that without such relief the granting of four wells exceeded the necessities of the case and was arbitrary, discriminatory, and confiscatory as to cross-petitioners, denying them equal protection of the law and taking their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) In failing to hold that the trial court erred in its finding of fact No. V, to the effect that the conditions have so changed since the granting of the Hammonds permit for well No. 1 on the strip that the judgment in Cause No. 54769 is not *res adjudicata* of the permits in the case at bar.

(7) In failing to hold that the trial court erred in concluding and holding that the challenged order of the Railroad Commission does not violate any of the rights of plaintiff or intervener under the Fourteenth Amendment to the Constitution of the United States.

G.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to

call for an exercise of this court's power of supervision, in this: Under the established law of the State of Texas applied to the undisputed facts, the permit orders involved are void and cross-petitioners are entitled to judgment annulling them and ancillary injunctive relief. The trial court stated in its conclusions of law that it is of the opinion that "the various matters of state law raised present no Federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction"; and further suggested that the parties should be "relegated to the state courts" for determination of the matters of state law (R. 91-2); but the judgment of the trial court dismissed the complaints without reserving to cross-petitioners the right to present matters of state law to the state courts (R. 87); and in legal effect this is an adverse adjudication of such matters, under the state and federal decisions. 34 *C. J.* 788, Sec. 1206; *Jones* v. *City of Uvalde*, (Civ. App.) 144 S. W. (2d) 932 (writ refused); 26 *Tex. Jur.* 95, Sec. 397; *Baker* v. *Cummings*, 181 U. S. 117, 21 S. Ct. 578; *McWilliams* v. *Blackard*, (C. C. A. 8) 96 F. (2d) 43; *Sacks* v. *Stecker*, (C. C. A. 2) 62 F. (2d) 65, headnotes 8 and 9; *Wilson Cypress Co.* v. *Atlantic Coast Line R. Co.*, (C. C. A. 5) 109 F. (2d) 623, 625; *Brooks* v. *Arkansas-Louisiana Pipe Line Co.*, (C. C. A. 8) 77 F. (2d) 965, 968.

Although cross-petitioners requested the Circuit Court of Appeals to adjudicate the matters of state law and render judgment thereon for cross-petitioners, the Circuit Court of Appeals did not adjudicate such matters, nor decide whether they had been rightly or wrongly decided by the trial court. On the contrary, though recognizing the duty of the federal courts to apply the state law (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817; *Siler* v. *Louisville & N. R. Co.*, 218 U. S. 175, 29 S. Ct. 451) it reversed and remanded the case with instructions to the trial court to again adjudicate the matters of state law (R. 429, 440, 474).

Cross-petitioners urge that under the usual and accepted procedure it was the duty of the Circuit Court of Appeals to adjudicate the matters of state law and itself render judgment thereon for cross-petitioners, the requisite facts being undisputed. The Circuit Court of Appeals could determine such law questions as readily as the trial court, and by doing so additional delay and expense of litigation would be avoided. By granting a writ of certiorari this Court may render the final decree which the Circuit Court of Appeals should have rendered, under authorities cited, *supra*, p. 4.

2. The Burford strip having been created by voluntary subdivision from the west 50 acres in such width that it cannot be drilled in compliance with the spacing rule in existence at the time, under the settled law of Texas the Railroad Commission was without power to grant an exception to the spacing rule authorizing drilling of wells on the strip on the ground of necessity "to prevent confiscation of property" (the sole ground on which those in controversy were granted), and therefore the Burford permit orders are void. *Gulf Land Company* v. *Atlantic Refining Company*, 134 Tex. 59, 131 S. W. (2d) 73, 81, holding with reference to such subdivisions, "exception permits may be issued to protect such tracts from waste; but such exception permits cannot be issued to protect such tracts, as such, from confiscation." *Sun Oil Company* v. *Railroad Commission*, (Civ. App.) 68 S. W. (2d) 609, 613, affirmed 125 Tex. 540, 84 S. W. (2d) 693, applying this same rule and explaining the underlying reason therefor to be that the spacing rule, validly issued and operating prospectively, has the same force and effect as a legislative act, and therefore all parties dealing with mineral leasehold titles must take cognizance of the rule and make their contracts and conveyances in keeping with its terms and not in violation of it, so that no right to an exception can arise from the carving

out of a tract, while the rule is in effect, in such shape or size that no well can be drilled thereon in compliance with the rule; that to hold otherwise would set at naught the conservation laws of the state; and that the Commission, while keeping the general spacing rule in effect, cannot itself arbitrarily grant exceptions thereto which would indubitably destroy the efficacy of the rule itself. *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 945; *Lippincott* v. *Atlantic Refining Co.*, (Civ. App.) 128 S. W. (2d) 847, 848; *Humble Oil & Refining Co.* v. *Railroad Commission*, 68 S. W. (2d) 625 (application for writ dismissed); *Smith* v. *Stewart*, 68 S. W. (2d) 627, affirmed 83 S. W. (2d) 945; *Railroad Commission* v. *Lamb*, 81 S. W. (2d) 161, 163; *Barnsdall Oil Co.* v. *Railroad Commission*, 83 S. W. (2d) 714 (writ refused); *Smith* v. *Shabay*, 83 S. W. (2d) 719; *Humble Oil & Refining Co.* v. *Railroad Commission*, 85 S. W. (2d) 813 (application for writ dismissed); *Edgar* v. *Stanolind Oil & Gas Co.*, 90 S. W. (2d) 656, 657 (writ refused); *Barnsdall Oil Co.* v. *Railroad Commission*, 90 S. W. (2d) 663; *Shell Petroleum Co.* v. *Burnett*, 91 S. W. (2d) 1091; *Railroad Commission* v. *Royal Petroleum Corp.*, 93 S. W. (2d) 761 (writ dismissed); *Stanolind Oil & Gas Co.* v. *Railroad Commission*, 92 S. W. (2d) 1057 (writ refused); *Empire Gas & Fuel Co.* v. *Railroad Commission*, 94 S. W. (2d) 1240, 1242 (writ refused); *Railroad Commission* v. *Wood*, 95 S. W. (2d) 1328 (writ refused); *Murphy* v. *Turman Oil Company*, 97 S. W. (2d) 485, 487 (writ dismissed); *Tide Water Associated Oil Co.* v. *Railroad Commission*, 12[illegible] S. W. (2d) 544, 545.

The Railroad Commission cannot grant permits in disregard of its own rule, and if it does they are void and the courts will annul them. *Sun Oil Company* v. *Railroad Commission* (Civ. App.), 68 S. W. (2d) 609, 612; *Atlantic Oil Production Co.* v. *Railroad Commission*, 85 S. W. (2d) 655, 657 (writ dismissed); *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 944-5; *Gulf Land Co.*

pany v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, where in affirming judgment canceling a permit, the court said (p. 79) "We think the Commission is bound by its own rule • • •" and (p. 86) "It is evident from what we have said that we hold the Commission violated its own order in issuing this well permit to prevent confiscation of property."

3. The proper court of the state in Cause No. 54769 had already determined that no right to an exception exists to drill a well on this strip, and annulled a prior permit. This was a suit between cross-petitioners on the one hand and the Railroad Commission and Burford's and X Y Z Company's predecessor in title on the other hand, and since no material changes in conditions have occurred creating any better reason for drilling the strip now than existed when the former permit was granted, such judgment, under the settled law of the state, is *res adjudicata* against Burford's and X Y Z Company's claim of right to drilling permits on the strip, and against the Commission's claim of power to grant them. *Shell Petroleum Corp.* v. *Railroad Commission*, 86 S. W. (2d) 57, 59 (writ dismissed); *Magnolia Petroleum Co.* v. *New Process Production Co.*, 104 S. W. (2d) 1106, 1110; *Railroad Commission (Acme)* v. *Humble Oil & Refining Co.*, 119 S. W. (2d) 728, 729, 730 (writ refused); *Gulf Land Co.* v. *Atlantic Refining Co.* (C. C. A. 5), 113 F. (2d) 902, 905; *Cain* v. *Balcom*, 130 Tex. 497; *Crane* v. *Blum*, 56 Tex. 325; *Railroad Commission v. Shell Oil Co., Inc.*, opinion of Austin Court of Civil Appeals in Cause No. 9249, filed October 21, 1942, not yet reported.

4. Under the law of the State the Railroad Commission is without jurisdiction to grant additional permits on a tract while the courts are in the process of determining validity of a drilling permit previously granted on the same tract. The Railroad Commission therefore had no jurisdiction to grant the Burford permits because at that

time Cause No. 53915 was pending in the District Court of Travis County, the purpose of which suit was to test the validity of, and to annul, a prior order of the Railroad Commission granting the predecessor in title of Burford and X Y Z Company a permit to drill on this same strip. The Commission being without jurisdiction of the subject matter, its orders permitting Burford to drill are void under the established law of the State. *Stewart* v. *Smith*, 126 Tex. 292, 83 S. W. (2d) 945, 947, holding "• • • after the judicial arm of the state had assumed jurisdiction of the matter, the Railroad Commission undertook to act again • • • the Railroad Commission was without jurisdiction." *Gulf Oil Corporation* v. *Rudco Oil & Gas Co.* (Civ. App., 1942), 164 S. W. (2d) 222; *Barnsdall Oil Co.* v. *Railroad Commission* (Civ. App.), 90 S. W. (2d) 663, 664; *Edgar* v. *Stanolind Oil & Gas Co.* (Civ. App.), 90 S. W. (2d) 656 (writ refused); *Turnbow* v. *Barnsdall Oil Co.* (Civ. App.), 99 S. W. (2d) 1096, 1100 (writ refused); *McNeny* v. *Railroad Commission* (Civ. App.), 96 S. W. (2d) 96, 98-9, holding:

> "• • • as long as a suit is pending to test the validity of a permit to drill on a specific tract of land as an exception to rule 37, the Commission is deprived of all jurisdiction to entertain or consider a subsequent application for such permit, and any order it may enter in that regard is void."

5. The "confiscation" exception clause in the spacing rule relates to giving a tract, entitled to development, such number of wells as are necessary to enable the owner thereof to recover the oil and gas in place under the tract, *or their equivalents in kind. Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 85; *Railroad Commission et al.* v. *Gulf Production Co.*, 134 Tex. 122, 132 S. W. (2d) 254, 255. Obviously, the Commission made no attempt to apply the term in that sense to this

2.33 acre strip in granting it four wells, when the undisputed testimony showed that one would produce more than the oil in place under it; and as stated in *Atlantic Refining Co.* v. *Buckley* (Civ. App.), 123 S. W. (2d) 413, 415 (writ dismissed), "The net result of this would be that under the guise of protecting this small tract from confiscation, he would be enabled to confiscate oil from adjacent tracts."

In the *Gulf Land Company* case, the Texas Supreme Court said, page 85:

> "In administering our oil and gas conservation statutes, *the Commission must be fair, and must not indulge in unreasonable discriminations between different oil fields, or between different tracts of land in the same field.* • • •
>
> "In the exercise of its power to grant exceptions to its rules, it is the duty of the commission to treat all interested parties justly, fairly, and impartially under all the facts and circumstances of the case; • • •." (Italics ours.)

The Commission is without power, under the confiscation ground of exception, to grant a tract permits for more wells than are necessary for such purpose, and therefore its action in granting four, when one will produce more than the oil under the strip, was arbitrary and should be annulled. *Railroad Commission, et al.* v. *Gulf Production Co.*, 134 Tex. 122, 132 S. W. (2d) 254, affirming opinion of the Court of Civil Appeals in 115 S. W. (2d) 505; *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73; *Atlantic Oil Production Co.* v. *Railroad Commission*, (Civ. App.) 85 S. W. (2d) 655; *Edgar* v. *Stanolind Oil & Gas Co.*, (Civ. App.) 90 S. W. (2d) 656, 658 (writ refused); *Railroad Commission* v. *Arkansas Fuel Oil Co.*, (Civ. App.) 148 S. W. (2d) 895, 898; *Gulf Oil Corporation* v. *Smith*, (Civ. App.) 145 S. W. (2d) 280, 283; *Allen* v. *Gulf Oil Corporation*, (Civ. App.) 139 S. W. (2d) 207, 209; *Spear* v. *Humble Oil & Refining*

Co., (Civ. App.) 139 S. W. (2d) 212, headnote 3; *Shell Petroleum Corporation* v. *Railroad Commission*, (Civ. App.) 137 S. W. (2d) 797, 798.

6. The action of the Railroad Commission in permitting four wells on the strip in the light of the existing proration order and cross-petitioners' offer to pool their properties with the strip for development purposes, when one well would have given the strip more than its share of the oil, without making provision for the protection of cross-petitioners' property by adjusting the allowable of wells on the strip, exceeded the necessities of the case, and was arbitrary, discriminatory and confiscatory as to cross-petitioners, denying them equal protection of the law and taking their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 944, in which the Supreme Court of Texas stated that if conditions arise where it would be proper to drill on a subdivided strip, "* * * in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas. By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land." *Magnolia Petroleum Co.* v. *Blankenship*, (C. C. A. 5) 85 F. (2d) 553, 555, 556; *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 132 S. W. (2d) 254, 255, holding:

> "* * * the facts of this record show, as a matter of law, that a third well on this tract would enable Tippett to recover more than his fair share of the oil and gas in or under his land, or their equivalents in kind. Under such a record, the granting of this permit to prevent confiscation was an abuse of power on the part of the Commission, and therefore unlawful."

Ownership in place is a rule of property in Texas. *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 944. By the conservation statutes and rules cross-petitioners are limited both in number of wells they may drill and the quantity of oil and gas they may produce, so that they may no longer fully fend for themselves; and because of this, proper provision must be made so that Burford and X Y Z Company may not take undue advantage of them. *Henderson* v. *Terrell*, (W. D. Tex., 1938) 24 F. Supp. 147, 152. The Railroad Commission "must be fair and must not indulge in unreasonable discrimination * * * between different tracts of land in the same field." *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 85. The granting of four wells on the strip, without adjusting the allowable, has the effect of taking oil from cross-petitioners and giving it to Burford and X Y Z Company. This is confiscatory and discriminatory. *Consolidated Gas Utilities Corp.* v. *Thompson*, 14 F. Supp. 318, 328.

The police power is not to be used to benefit one at the expense of another. There was a way open to the Commission to accomplish fully any legitimate objective without placing the permittee in position so greatly to drain cross-petitioners' oil, and in the light of the facts the action of the Commission violates cross-petitioners' rights under the Fourteenth Amendment to the Constitution of the United States.

7. The action of the Circuit Court of Appeals in failing to apply the State law is in conflict with the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, declaring that to be its duty; and is in conflict with the action of the Circuit Court of Appeals, Fifth Circuit, in *Gulf Land Co.* v. *Atlantic Refining Co.*, 113 F. (2d) 902, and *Smith* v. *Merrill*, 81 F. (2d) 609, being cases of similar nature in which it actually undertook to apply the state law.

8. The judgment of the Circuit Court of Appeals affects the rights of cross-petitioners in a substantial way, as hereinabove shown.

WHEREFORE, cross-petitioners pray that writ of certiorari be issued to the Circuit Court of Appeals, Fifth Circuit, to the end that this Court may review and determine this cause on the full and complete transcript of the record and proceedings in the case numbered and entitled on its docket 9962, *Sun Oil Company, et al., Appellants,* v. *G. E. Burford, et al., Appellees,* and that only that portion of the judgment of said Circuit Court of Appeals which remands the cause to the District Court be set aside, and that judgment be here rendered for cross-petitioners annulling the permit orders involved and enjoining the drilling and operation of the four well locations, and in the alternative that judgment be rendered enjoining the operation of said wells until such time as the Railroad Commission shall adjust the allowables thereof, as more fully prayed in cross-petitioners' complaints below; for costs and such other relief as to this Court may seem proper and just.

SUN OIL COMPANY,
MAGNOLIA PETROLEUM COMPANY,
Cross-Petitioners;
T. L. FOSTER,
MARTIN A. ROW,
Dallas, Texas;
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APPENDIX.

Vernon's Texas Statutes, 1936.

Art. 6014. "*Waste.*"—The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

* * * * * * *

(b) The drowning with water of any stratum or part thereof capable of producing oil or gas, or both oil and gas, in paying quantities.

(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

* * * * * * *

(e) The creation of unnecessary fire hazards.

(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be united under one management, control or ownership.

* * * * * * *

The Commission may consider any or all of the above definitions, whenever the facts, circumstances or conditions make them applicable, in making rules, regulations or orders to prevent waste of oil or gas.

* * * * * * *

(Acts 1919, p. 285; Acts 1929, 41st Leg., p. 694, ch. 313; Acts 1931, 42nd Leg., 1st C.S., p. 46, ch. 26, § 1; Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2, § 1; Acts 1935, 44th Leg., p. 180, ch. 76, § 8.)

Art. 6029. Rules and regulations.—The Commission shall make and enforce rules, regulations or orders for the conservation of crude petroleum, oil and natural gas and to prevent the waste thereof, including rules, regulations or orders for the following purposes:

(1) To prevent the waste, as hereinbefore defined, of crude petroleum oil and natural gas in drilling and producing operations and in the storage, piping and distribution thereof.

* * * * * * *

(3) For the drilling of wells and preserving a record thereof.

(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

* * * * * * *

(8) It shall do all things necessary for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, and shall make and enforce such rules, regulations or orders as may be necessary to that end.

* * * * * * *

(Acts 1919, p. 285; Acts 1931, 42nd Leg., 1st C.S., p. 46, ch. 26, § 15; Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2, § 7; Acts 1935, 44th Leg., p. 180, ch. 76, § 4.)

Art. 6049c. Oil and gas conservation. Sec. 8. Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission,

or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. (As amended Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2, § 8; Acts 1935, 44th Leg., p. 180, ch. 76 § 14.)

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,
Petitioners

v.

SUN OIL COMPANY, ET AL.,
Respondents

BRIEF FOR PETITIONERS

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FIRM FOUNDATION—AUSTIN

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4. Even if the duty rested upon the District Court to exercise its independent judgment in determining the reasonableness of the Railroad Commission's order under the state law, the District Court heard sufficient evidence to justify its holding that the order is valid under the state law 26

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BRIEF FOR PETITIONERS

OPINIONS BELOW

No formal opinion was written by the District Court, but findings of fact and conclusions of law were filed (R. 88-92). Three opinions have been written by the Circuit Court of Appeals. On December 29, 1941, the Circuit Court of Appeals wrote a unanimous opinion (R. 409) affirming the judgment of the District Court, which opinion is reported in 124 F. (2d) 467. The first petition for rehearing (R. 415) filed by the respondents, Sun Oil Company, et al., was overruled without opinion on February 2, 1942 (R. 421). The respondents, Sun Oil Company, et al., filed a second petition for rehearing on June 1, 1942, (R. 421) and on July 11, 1942, the Circuit Court of Appeals wrote an opinion granting

the second petition for rehearing, setting aside its former judgment, and reversing the judgment of the District Court (R. 429). Judge McCord wrote a special concurring opinion (R. 440). These opinions are reported in 130 F. (2d) 10, 18. On August 12, 1942, the Circuit Court of Appeals wrote an opinion denying the motion of Republic National Bank of Dallas for leave to file a petition in intervention in the nature of a petition for rehearing (R. 474). Judge McCord dissented from this opinion (R. 476). These opinions are reported in 130 F. (2d) 18, 19.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347). The judgment to be reviewed was entered on July 11, 1942 (R. 440), and these petitioners' petition for rehearing was denied on August 13, 1942 (R. 477). The petition for a writ of certiorari was filed in this Court on October 27, 1942, and was granted on December 14, 1942.

STATEMENT OF THE CASE

This suit was brought by the Sun Oil Company, a New Jersey corporation, against G. E. Burford and the Railroad Commission of Texas and its members, all Texas citizens, and X.Y.Z Oil & Gas Company, an Oklahoma corporation, to set aside and nullify an

order entered by the Railroad Commission dated June 2, 1939 (R. 31) permitting Burford to drill four oil wells upon his 2.33 acre lease in the East Texas Oil Field and to enjoin the drilling and production of oil from such wells. In the alternative, it was prayed that production from these wells be enjoined until the Railroad Commission should restrict the production from such wells to an amount in proportion to the acreage of said lease (R. 29). Jurisdiction was alleged by reason of diversity of citizenship and also because of plaintiff's claim that the Railroad Commission's order violated its property rights under the 14th Amendment to the Constitution of the United States (R. 2). Magnolia Petroleum Company, a Texas corporation, was permitted to intervene as a plaintiff, alleging that the Railroad Commission's order violated its property rights under the 14th Amendment (R. 34). Both the plaintiff and the intervener attacked the validity of the Railroad Commission's order under the state law, under the provisions of Article 6049c, sec. 8, Vernon's Annotated Texas Civil Statutes*, as well as under the Federal Constitution.

*This statute reads as follows:

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of such laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

The grounds of attack under the Fourteenth Amendment were that the Railroad Commission did not hear "substantial evidence" justifying the granting of the permit (R. 15-17, 20), that such evidence as was heard was not properly considered by the Railroad Commission (R. 14-15) and that the permit order would give Burford an unreasonable "advantage in drainage opportunity." (R. 23, 25).

The same grounds on which the Railroad Commission's order was asserted to be invalid under the Fourteenth Amendment were also urged as grounds for striking down the order under the state law, and the following additional grounds of attack under the Texas statutes were also urged: (1) that the Railroad Commission had no authority under the state law to consider the 2.33 acre tract as a separate tract in determining whether a permit should be granted to drill wells as exceptions to the spacing rule, because of the narrow dimensions of the tract (R. 9); (2) that a judgment of the state court of Travis County, in Cause No. 54,769, in that court, nullifying a permit granted October 11, 1934, to drill a well upon the same tract of land, which judgment was entered January 31, 1935, had the effect of making the question of the right to drill any well upon the 2.33 acre strip *res judicata* (R. 12); (3) that the Railroad Commission was without jurisdiction to grant the Burford permit because of the pendency of another suit in the state court in Travis County, in Cause No. 53,915, involving the validity of a permit dated February 1, 1934, granted to a previous lessee upon the same tract of land (R. 15).

The case was tried by the District Judge without a jury. The evidence included the transcripts of the testimony taken at the three hearings before the Railroad Commission (R. 233-366) and also original evidence relating to the reasonableness of the Railroad Commission's order (R. 366-399), and the procedure before the Railroad Commission (R. 213-230).

The evidence showed that the permittee, G. E. Burford, was the owner of an oil and gas lease on a narrow strip of land containing 2.33 acres in the East Texas oil field. Prior to 1939, no wells had been drilled on Burford's lease (R. 381, 391). Sun Oil Company owns a 50 acre lease immediately west of Burford's tract, on which it has drilled seven wells, and Magnolia Petroleum Company owns a 50 acre lease immediately east of Burford's tract, on which it has drilled six wells (R. 104, 150, 399). The wells drilled by Sun Oil Company and Magnolia Petroleum Company, prior to the Railroad Commission's hearing in 1938, had already produced about 5,000 barrels of oil per acre, or about 250,000 barrels from each lease (R. 347). Because of the location of these leases in the extreme eastern portion of the East Texas oil field, all of this oil has been replaced by oil migrating from other leases (R. 347). These wells on the Sun and Magnolia leases have drained and are still draining oil from Burford's lease (R. 243-245) as well as from other surrounding tracts. Without the wells granted by the Railroad Commission, Burford would have no opportunity to recover the oil under this tract or its equivalent. Of the four wells

drilled by Burford on his lease, one was a dry hole and another was a pumper (R. 391).

With regard to the plea of *res judicata*, the evidence showed substantial changes in the situation in this particular area (R. 376, 395), as well as notorious changes in reservoir conditions during the intervening years (R. 375). With regard to the pendency of a suit testing the validity of another permit, issued in 1934, in the state court, the record showed that this early order had been issued without notice and had been abandoned by the permittee long before Burford made his application (R. 237, 292). The evidence regarding the procedure before the Railroad Commission (R. 213-230) showed that the Railroad Commission gave due consideration to the evidence taken before its examiner, and the attack on the Railroad Commission's order for lack of procedural due process has been in fact abandoned by the respondents, since it was never raised in the Circuit Court of Appeals or in respondents' cross-petition for a writ of certiorari.

At the conclusion of the evidence, the District Court entered judgment for the defendants, after announcing his opinion "that the issues of law and fact are with the defendants" (R. 87). The District Court also entered findings of fact and conclusions of law in which, after finding the facts in favor of the defendants, he concluded (1) "that the challenged order of the Railroad Commission of Texas does not violate any of the rights of the plaintiff or the intervener under the 14th Amendment to the Constitu-

tion of the United States" (R. 90), and (2) "that the various matters of state law raised present no federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction" (R. 91).

Upon appeal to the United States Circuit Court of Appeals for the Fifth Circuit that court (Judges Holmes, McCord, and Dawkins) on December 29 1941, affirmed the judgment of the District Court. The unanimous opinion (124 F. (2) 467) held (1) that the effect of the decisions of this Court in the two cases entitled *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, and 311 U. S. 570, was to relegate the parties to the state courts for decision of all questions of state law and, therefore, that these questions should not be decided by the federal courts and (2) that the record did not show "conditions amounting to a denial of Due Process or other violations of the Federal Constitution" (124 F. (2d) at p. 470).

A first petition for rehearing was filed by the respondents Sun Oil Company, et al., on January 19, 1942 (R. 415). This first petition for rehearing was denied without opinion on February 2, 1942 (R. 421). No request for a stay of mandate was filed and on February 17, 1942, the mandate was issued (R. 429). No attempt was made by the appellants, Sun Oil Company and Magnolia Petroleum Company, to take the case to the Supreme Court of the United States by certiorari or otherwise.

Nearly four months after the first petition for re-

hearing was denied and more than three months after the mandate was issued, Sun Oil Company and Magnolia Petroleum Company, on June 1, 1942, filed a second petition for rehearing (R. 421). This second petition for rehearing raised no new questions of law or fact, merely adopting the arguments therefore presented in the first petition for rehearing, and asserting that the court's decision in this case was in conflict with its later decision in *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334, decided May 13, 1942 (Judges Hutcheson and Foster; Judge McCord dissenting).

Over the objections of the petitioners that the second petition for rehearing was filed too late and was without merit (R. 423), the Circuit Court of Appeals on July 6, 1942, entered its order recalling its mandate and permitting the second petition for rehearing to be filed (R. 429). Thereafter, on July 11, 1942, the Circuit Court of Appeals set aside its former judgment, reversed the judgment of the District Court and remanded the case to the District Court for a new trial (R. 440). While not agreeing with the conclusion expressed in the majority opinion by Judge Hutcheson in the case of *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334, the court (with Judge McCord specially concurring) nevertheless held that its former judgment should be set aside, because, since the rendition of said judgment, the Supreme Court of Texas March 11, 1942, had held in the case of *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022, that under the Texas statutes, the review of the Railroad Commission's

order is strictly *de novo* and that in reviewing the reasonableness of the Railroad Commission's order, the court should exercise its "independent judgment."

Disregarding the fact that the District Court had already passed on all questions of fact and of state law, upon original evidence, in favor of the validity of the Railroad Commission's order, and without discussing the sufficiency of the evidence to sustain the District Court's finding, the Circuit Court remanded the case for a new trial, in order that the District Court might, in its "independent judgment," determine "whether at the time of promulgation there existed facts that warranted fair and reasonable minds in arriving at the conclusion that the order was proper and necessary to prevent the waste of public resources or confiscation of private property" (130 F. (2d) at pp. 17, 18).

A first petition for rehearing was filed by petitioners and was denied by the court without opinion on August 13, 1942 (R. 477). A motion for leave to file a petition in intervention in the nature of a petition for rehearing was presented by Republic National Bank of Dallas, which had loaned $30,000.00 upon an oil payment in reliance upon the first judgment of the court (R. 447). This motion was denied on August 12, 1942 (R. 477). The opinion of the court (R. 474) was written by Judge Holmes (130 F. (2d) at p. 18). Judge McCord dissented upon the ground that "the Appellants' Second Petition for Rehearing came too late and should not have been granted" (R. 476, 130 F. (2d) at p. 19).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that it had jurisdiction to grant the respondents' second petition for rehearing and to set aside the judgment entered December 29, 1941, when said second petition for rehearing was filed more than three months after the first petition for rehearing was denied, more than three months after the mandate had been issued, and more than three weeks after the expiration of the period fixed by statute for applying to the Supreme Court of the United States for a writ of certiorari.

2. In holding that it should grant the respondents' second petition for rehearing when the respondents had not shown any diligence in attempting to secure a review of the judgment entered December 29, 1941, in that they failed to exercise their right to petition the Supreme Court of the United States for a writ of certiorari to review said judgment.

3. In holding that the United States District Court must determine the validity under the Texas law of an order of the Railroad Commission of Texas granting a permit to drill four oil wells by the exercise of the court's "independent judgment" on the question of whether the facts warranted the conclusion that the administrative order was proper and necessary to prevent the waste of public resources or the confiscation of private property.

4. In reversing the judgment of the District Court and in remanding the case for a new trial, since the District Court, upon original and sufficient evidence, decided all issues of fact and of state law in favor of the validity of the Railroad Commission's order.

ARGUMENT

Summary of Argument

1. The Circuit Court of Appeals did not have jurisdiction to entertain and to grant the respondents' second petition for rehearing, since the second petition for rehearing was filed more than three months after the first petition for rehearing had been denied.

2. If the Circuit Court of Appeals had jurisdiction to entertain the second petition for rehearing filed by the respondents, it abused its discretion in granting said petition since said petition raised no new question of fact or law and the respondents had not shown the proper diligence in that they had failed to apply for a writ of certiorari to this Court within the statutory period.

3. The Circuit Court of Appeals erred in holding that the District Court should determine the validity of the Railroad Commission's order under the state law by the exercise of its "independent judgment" as to the reasonableness of such order, prior to the determination of the validity of such order in the state court.

4. The evidence heard by the District Court was

sufficient to sustain its findings and conclusions that the order attacked was valid under the state law.

1.

The Circuit Court of Appeals was without jurisdiction to entertain or grant the respondents' second petition for rehearing, because said second petition for rehearing was filed after the time had expired for applying for a writ of certiorari from the original judgment entered by the Circuit Court of Appeals.

The Circuit Court of Appeals' first judgment was entered December 29, 1941 (R. 413); the appellants' first petition for rehearing was denied February 2, 1942 (R. 421); no motion for a stay was filed and the mandate was issued February 17, 1942 (R. 429). Nothing further was done by appellants until their second petition for rehearing was filed June 1, 1942 (R. 421). This second petition for rehearing set up no new questions of law or fact, but merely incorporated by reference (R. 422) the contentions made in the first petition for rehearing.

There is no provision contained in the rules of the Circuit Court of Appeals for a second petition for rehearing. Previously that court had stated that its rules did not contemplate the filing or consideration of second petitions for rehearing, particularly where such petitions presented no new questions not previously raised. See *City of Stuart* v. *Green*, 91 F. (2d) 603, 606, where Judge Holmes said:

> "Our rules do not contemplate the filing or consideration of second applications for rehearing. The petition now filed presents nothing that

had not been previously considered. Such practice is not to be encouraged. Williams v. Conger, 131 U. S. 390, 9 S. Ct. 793, 33 L. Ed. 201."

After the first petition for rehearing was denied on February 2, 1942, the respondents had three months within which they could seek a review by this Court of the judgment of the Circuit Court of Appeals by a petition for a writ of certiorari. 28 U. S. Code, sec. 350. This time expired on May 2, 1942. From February 2, 1942, to June 1, 1942, the respondents had taken no action of any character whatever to stay or to review the judgment entered December 29, 1941. It is submitted that upon the expiration of the time fixed by statute for review by this Court, the Circuit Court of Appeals' judgment became final and the Circuit Court of Appeals had no power thereafter to permit the filing of a second petition for rehearing.

The holding of the Circuit Court of Appeals that it retained jurisdiction to entertain and grant the respondents' second petition for rehearing is based on the purely technical conception of the term of court. The statute (Judicial Code, section 126; 28 U. S. C., section 223) and the rules of the Circuit Court of Appeals do not fix the length of the terms of court, but merely provide that a session of the court shall be held annually at the places named, including one session at the City of Fort Worth, Texas, beginning on the first Monday in November. (Rule 3, United States Circuit Court of Appeals for the Fifth Circuit.) The Circuit Court of Appeals ap-

parently construes the statute and its rule to mean that each term lasts for one year. The Circuit Court of Appeals holds that it retains jurisdiction to entertain a petition for rehearing filed at any time during the term at which the judgment is rendered, regardless of the fact that the time for applying for a writ of certorari to this court has expired. Since the terms of court apparently last for one year each, it may be as much as eleven months or longer after a judgment is rendered and a first petition for rehearing is overruled, before the term expires and the judgment can be considered final.

The evident intention of Congress in enacting Section 350 of Title 28, United States Code, limiting the time within which a petition for certiorari may be filed for review of a judgment of the Circuit Court of Appeals to three months after the judgment was entered, was to fix a period of time within which the judgments of such courts might be considered final. It is contrary to every consideration of policy in favor of reasonably prompt termination of litigation to permit a party to wait until this period has expired and then to reopen the case by filing a second petition for rehearing in the Circuit Court of Appeals. The Supreme Court has no jurisdiction to review a decree of the Circuit Court of Appeals where the petition for certiorari is not filed until after the statutory period has expired. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399. The period for filing a petition for rehearing in the Circuit Court of Appeals should certainly be no longer than the

period allowed by statute for applying for review by this Court.

This question has not been settled by any decision of this Court. The only cases cited by the Circuit Court of Appeals to sustain its holding do not relate to the question of the jurisdiction of that court to entertain a petition for rehearing which is filed after the time for review in this Court has expired. In *Henderson* v. *Carbondale Coal & Coke Co.*, 140 U. S. 25, the petition for rehearing was promptly filed; in such case, it is conceded that a court may grant a rehearing and set aside its judgment entered during the same term of court. In *Thomsen* v. *Cayser*, 243 U. S. 66, the opinion does not disclose when the petition for rehearing was filed, and no point was raised or discussed about the time when it was filed.

In this connection, we respectfully direct the court's attention to the analogy of the limitation placed on motions for new trial in the District Courts under the Rules of Civil Procedure. Under Rule 6(c) the time for doing an act or taking any proceeding is not limited by the expiration of the term of court. Under Rule 59(b) the time in which a motion for new trial can be served cannot extend beyond "the expiration of the time for appeal." It is submitted that the same principles apply to this case. The term of court has no logical connection with the time for filing a petition for rehearing, and in any event the court entering a judgment should not permit the filing of a petition for rehear-

ing after the time for applying for review in the appellate court has expired.

2.

If the Circuit Court of Appeals had jurisdiction to permit the filing of the respondents' second petition for rehearing, it abused its discretion in granting said second petition for rehearing because said petition presented no equitable grounds for a rehearing and no new questions of law or fact.

The respondents' second petition for rehearing did not set up any fact or urge any questions of law which had not theretofore been thoroughly presented. In their second petition for rehearing, respondents moved the court "to reconsider their petition for rehearing heretofore filed on January 19, 1942, each ground of which is here adopted." (R. 422). The occasion for filing the second petition for rehearing was that it was alleged that in a different case, entitled *Selby Oil & Gas Co.* v. *Railroad Commission*, the Circuit Court of Appeals on May 13, 1942, had handed down a decision which was inconsistent with the first decision in the present case. (R. 422).

It will be noted that there were no allegations of fraud, mistake, or any other equitable ground for obtaining a rehearing of the cause. Nor was there any allegation of newly discovered facts or evidence. The only ground for asking that the second petition

for rehearing be granted was that the court had decided the same questions of law, heretofore decided in this case, in a different way in a subsequent case.

The questions presented and decided by the Circuit Court of Appeals in its first judgment and opinion which were alleged by the respondents to have been differently decided in the Selby Case were questions that had to do with the interpretation of the opinions of this Court in the *Rowan & Nichols Cases*, 310 U. S. 573 and 311 U. S. 570. It was contended by the respondents in their second petition for rehearing that whereas the Circuit Court of Appeals in the first decision of this case had held that all questions of state law were to be relegated to the state courts for decision, in the Selby Case the same court had held that questions of state law should be decided by the federal courts in cases involving diversity of citizenship. In other words, Judge Dawkins in the first opinion in this case held that the Rowan & Nichols cases meant that questions of state law should not be adjudicated by the federal courts, whereas Judge Hutcheson in the Selby case construed the same decisions of this court to mean that questions of state law should be decided in cases involving a diversity of citizenship.

By the exercise of proper diligence, the respondents could have obtained a review of the first judgment of the Circuit Court of Appeals in this case on this particular question by making a timely appli-

cation for a writ of certiorari, on the ground that the Circuit Court of Appeals had misconstrued the effect of the opinions in the Rowan & Nichols cases. They neglected to do so. They had a plain remedy available but they failed to take advantage of it. The granting of a petition for rehearing, and particularly a second petition for rehearing, should be contingent upon the exercise of the utmost diligence by the party asking for such rehearing and where, as in this case, such diligence is entirely absent, the Circuit Court of Appeals abused its discretion in granting the relief prayed for, even assuming that it had jurisdiction to entertain the second petition for rehearing.

3.

The Circuit Court of Appeals erred in holding that the District Court should exercise an independent judgment on the reasonableness of the Railroad Comission's order under the Texas statutes.

The question here presented is the extent to which the federal courts will inquire into the reasonableness of the order of a state administrative body in determining the validity of such order under the state law. The question turns upon the proper interpretation of opinions of this Court in the *Rowan & Nichols Cases*, 310 U. S. 573 and 311 U. S. 570.

The District Judge who tried this case is the same District Judge who tried the first *Rowan & Nichols*

Case, 310 U. S. 573, and was a member of the three-judge court which tried the second *Rowan & Nichols Case*, 311 U. S. 570. The record in this case shows that the District Judge conscientiously followed this Court's opinions in the *Rowan & Nichols Cases*. After holding that the Railroad Commission's order "does not violate any of the rights of the plaintiff or the intervener under the 14th Amendment to the Constitution of the United States" (R. 90), the District Judge then held that "the various matters of state law raised present no federal question and further present no matters of such merit as to warrant the issuance of an injunction" (R. 91). The District Judge construed the *Rowan & Nichols Cases* to hold that in applying the state law in "oil regulation cases," relief by injunction in the federal courts should not be granted "unless some condition is uncovered more extreme than those on which the courts have heretofore felt warranted in acting" (R. 91). Since such conditions were not found to exist in this case, the District Court denied relief.

The Circuit Court of Appeals in its first opinion approved the holding of the District Court that the evidence did not show any violation of the respondents' rights under the 14th Amendment (124 F. (2d) at p. 470). Although the District Court had expressly held that the various matters of state law presented were without merit (R. 91), the Circuit Court of Appeals misconstrued the District Court's action and held in effect that the District Court had refused to pass on the issues of state law (124 F.

(2d) at p. 468). The Circuit Court of Appeals then approved the District Court's judgment in the following language (124 F. (2d) at p. 469):

> "In the absence of a clear showing of confiscation or lack of Due Process, such bodies should be left, at least by the Federal Courts, to deal with the situation, unless and until the court of last resort of the State has decided that an 'independent judgment' as to reasonableness should be exercised by the courts."

The Circuit Court of Appeals thus construed the opinions of this Court in the *Rowan & Nichols Cases* to mean that the extent to which a federal court would inquire into the reasonableness of an administrative order of a state board, in determining its validity under the state law, depends upon the construction by the state court of the state statute providing for the review of the administrative board's order.

Thereafter, on May 13, 1942, the same Circuit Court of Appeals (but with Judges Hutcheson, Foster, and McCord composing the court) in another oil regulation case reached an entirely different conclusion as to the extent to which the federal court should pass on the reasonableness of an order of the Railroad Commission. *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334. In an opinion by Judge Hutcheson, from which Judge McCord dissented, it was held (1) that in cases of diversity of citizenship, the state review statute (Article 6049c, Sec. 8, Vernon's Annotated Texas Civil Statutes)

presented a distinct "statutory suit" (128 F. (2d) at p. 335) in addition to the "constitutional suit," (2) that the rule stated by this court in the *Rowan & Nichols Cases* applied only to cases not involving diversity of citizenship (128 F. (2d) at pp. 336-337), (3) that in cases of diversity of citizenship, the Federal Courts should follow the state decisions and that, since the state decisions hold that in the "statutory suit" the court must exercise its "independent judgment" in determining "whether the order rests upon a reasonable basis," the District Court erred in not determining this "statutory suit" by the "rules established by the Texas court" (128 F. (2d) at p. 337). Judge McCord dissented upon the ground that the decision was in conflict with the *Rowan & Nichols Case* and also the recent decision by the same Circuit Court of Appeals in the present case (128 F. (2d) at p. 337).

On June 1, 1942, the appellants, Sun Oil Company, et al., filed their second petition for rehearing in this case, alleging that the decision in the *Selby Case* was in conflict with the decision theretofore rendered in the present case (R. 421).

In granting the second petition for rehearing in this case, the Circuit Court of Appeals stated that it did so "to avoid injustice to anyone from a conflict in our decisions" (130 F. (2d) at p. 13). However, Judge Holmes, in the majority opinion, refused to concur in the conclusion reached by Judge Hutcheson that there were two suits—a "constitutional suit" and a "statutory suit"—and held that there was

"only one suit" (130 F. (2d) at p. 16). Nevertheless, the court set aside its former judgment, because it purported to find in the decision of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Co.*, 161 S.W. (2d) 1022 (rendered March 11, 1942), a declaration that in determining the reasonableness of the Railroad Commission's orders, the state courts must exercise their "independent judgment" (130 F. (2d) at p. 16). The Circuit Court of Appeals regarded this alleged clarification of the Texas law as being sufficient ground for setting aside its former judgment of affirmance and substituting a judgment reversing the judgment of the District Court and remanding the case for a new trial (R. 440).

Judge McCord specially concurred in a separate opinion, in which he doubted the right of the Circuit Court of Appeals to grant a rehearing "after the lapse of such great length of time," but agreed to the reversal in order that "the two cases (the *Selby Case* and this case) can on a new trial be determined in conformity with the decision of the Supreme Court of Texas, and the conflict which now exists in our two opinions may be obliterated" (R. 440). No explanation was given as to how the District Court could obliterate the conflicts in the opinions of the Circuit Court of Appeals in the present case and the *Selby Case*, when the Circuit Court of Appeals could not itself harmonize its own opinions.

In overruling the motion of Republic National Bank of Dallas to intervene, the majority of the court again stated that "the supervening decision of the

Supreme Court of Texas, holding that the state courts might exercise such independent judgment, made it necessary for us to hold in our second opinion that the federal courts might decide such issues arising under the laws of the state. This was for the reason that prior to that time we deemed the particular point unsettled by Texas decisions, and were in doubt as to the state law on the subject" (130 F. (2d) at p. 19).

Judge McCord dissented from this opinion, his former doubts having become crystallized into the definite opinion "that the appellants' second petition for rehearing came too late and should not have been granted" (130 F. (2d) at p. 19).

The result of the three opinions in this case and the opinion in the *Selby Case* is to leave the applicable law in such confusion that it would be a practical impossibility for the District Judge to know how to try this case. The opinions of the Circuit Court of Appeals conflict with each other and all of them are in conflict with the law as laid down by this Court in the *Rowan & Nichols Cases.*

The effect of the opinion of the Circuit Court of Appeals in this case is that the federal courts must go as far as the state courts would go in exercising an "independent judgment" in determining whether the order of the Railroad Commission is reasonable or not under the state law. Under the Texas decision relied upon by the Circuit Court of Appeals, *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022, it is held that "the doctrine that the administrative

agency should take the testimony and make the findings of fact, and that the findings should be binding on the court, is foreign to the law of this state." (161 S. W. (2) at p. 1028.) The federal rule that the findings of a board, if supported by evidence are conclusive, is repudiated in Texas. (161 S. W. (2d) at p. 1028.) Evidence must be taken anew in the court. (161 S. W. (2d) at p. 1029.) "Whether the agency heard sufficient evidence is not material. In fact, the evidence heard by the agency is not per se admissible upon the trial in the District Court." (161 S. W. (2d) at p. 1030.)

It is evident that the process which must be followed by the Texas courts under the decision of the Texas Supreme Court, in determining whether the order of the Railroad Commission is valid under the state law, is very different from the process to be followed by a federal court in determining whether the order is valid under the 14th Amendment. Otherwise, there would have been no point in the Circuit Court of Appeals' action in reversing the judgment of the District Court, since the Circuit Court of Appeals in its first opinion had already held that the order was valid under the Federal Constitution (124 F. (2d) at p. 470.) This part of its opinion has not been withdrawn by the Circuit Court of Appeals. (130 F. (2d) at p. 19.) The opinion of the Circuit Court of Appeals must mean, therefore, that it is incumbent upon the federal court to determine the validity of the Railroad Commission's order under the state law by exercising an "independent judgment" upon the reasonableness of the order, disre-

garding any evidence that may have been heard by the Railroad Commission and any findings which it may have made upon such evidence, and determining for itself what constitutes "substantial evidence" to support the Commission's order.

It is submitted that this conclusion of the Circuit Court of Appeals is in direct conflict with the decisions by this Court in the *Rowan & Nichols cases*. In those cases, it was plainly stated that the Federal courts would go no further in testing the validity of an order of the Railroad Commission under the State's statutes than they would in testing its validity under the Federal Constitution. This Court's language in the first *Rowan & Nichols case* is as follows (310 U. S. at p. 584):

> "What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and it is not foreclosed by the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the federal courts."

In the second *Rowan & Nichols case*, this Court, in passing on the constitutional issue, said (311 U. S. at p. ~~346~~ 575):

> "Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their *independent judgment* on such matters against

that of the chosen state authorities." (Our emphasis.)

This Court further held that the District Court erred in striking down the order on the ground that it did not prorate production on a "reasonable basis," saying (311 U. S. at p. 577):

> "In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state courts, 311 U. S. 614."

In holding, as it has in this case, that the District Court must go beyond the inquiry which is necessary in order to test the validity of the Railroad Commission's order under the Due Process Clause and must follow the rule of the state courts and exercise its "independent judgment" on a trial de novo to determine the reasonableness of the order under the state statute, the Circuit Court of Appeals has held contrary to the decisions of this Court just referred to.

4.

Even if the duty rested upon the District Court to exercise its independent judgment in determining the reasonableness of the Railroad Commission's order under the state law, the District Court heard sufficient evidence to justify its holding that the order is valid under the state law.

To sustain their attack upon the validity of the Railroad Commission's order, the respondents offered and the District Court admitted in evidence the applications, protests, notices, and orders of the Railroad Commission pertaining to this particular permit (R. 136-161, 384), the general spacing orders of the Railroad Commission relating to the East Texas Field (R. 111-132), plats, deeds, and stipulations of the parties affecting title to the permit strip and the adjacent lands (R. 104-110, 212), copies of previous orders of the Railroad Commission granting permits to drill on the permit strip and court proceedings relating thereto (R. 164-208), the transcripts of the evidence heard by the Railroad Commission at the three hearings upon this permit (R. 233-384), the original testimony of the Railroad Commission examiner who conducted the hearings regarding the manner of taking the testimony and his report to the Railroad Commission (R. 213-230), and the original testimony of a petroleum engineer as to the drainage of oil to and from the permit strip and adjacent leases. (R. 366-383)

To sustain the order, the respondents offered the original testimony of two witnesses, A. O. Phillips, the drilling contractor who testified as to the facts regarding the four wells drilled under the permit (R. 340-342), and Gordon Griffin, a petroleum engineer, who testified as to the geological facts in connection with the East Texas field and this particular area. (R. 393-398)

The testimony of J. D. Copeland, the Railroad

Commission examiner (R. 213-230), related to the contention asserted by the respondents that the Railroad Commission did not give proper consideration to the evidence introduced at the hearings conducted by the examiner. (R. 14, 36.) The District Court found that a fair and proper consideration of the evidence was given by the Railroad Commission (R. 89-90). This ground for attack upon the order has been abandoned by the respondents, having never been raised at any time in the Circuit Court of Appeals or in the cross-petition for certiorari which was filed in No. 496, October Term, 1942, in this Court, entitled *Sun Oil Company, et al.* v. *G. E. Burford.*

The remaining grounds for attack upon the validity of the Railroad Commission's order under the state law were (1) that the 2.33 acre strip was a voluntary subdivision from a larger tract, made after the adoption of the Railroad Commission's spacing rule, and under the Texas decisions could not be considered by the Railroad Commission as a separate tract in granting a permit to drill a well as an exception to the spacing rule to prevent the confiscation of property (R. 20); (2) that a permit granted on October 11, 1934, to Burford's predecessor in title had been cancelled by a court order entered January 11, 1935, and that this court order made the validity of the present order *res judicata* (R. 12); (3) that at the time of the issuance of the Railroad Commission's permit order, a suit was then pending in the state courts attacking the validity of still another permit, which had been granted Febru-

ary 1, 1934, and that because of the pendency of such suit the Railroad Commission did not have jurisdiction to consider Burford's application (R. 13); and (4) that in any event, the Railroad Commission abused its discretion in granting a permit for four wells instead of a lesser number (R. 20-25).

The District Court found that "the issues of law and fact are with the defendants" (R. 87) and concluded that "the various matters of state law raised present no federal question and furthermore present no matter of such merit as to warrant the issuance of an injunction." (R. 91.) On the plea of *res judicata*, the court found that the conditions in the East Texas oil field and on the leases adjacent to the Burford lease had so changed since the entry of the court order in 1935 that the plea should be overruled. (R. 90)

The District Court's judgment is clearly sustainable under the state law:

(1) The Railroad Commission was entitled to consider the 2.33 acre strip as a separate tract. At the time of the subdivision of the 2.33 acre tract from the west 50 acres lease to Sun Oil Company, in February, 1931, the spacing rule in the East Texas oil field provided for spacing distances of 150 feet from property lines and 300 feet from other producing oil wells (R. 11). Converted to acreage, the rule contemplated the drilling of one well to about 2.07 acres. The strip is too narrow (49 feet x 2,131 feet) to allow the drilling of a well without a special per-

mit, but since the total area exceeds the area contemplated by the rule, the Railroad Commission may consider it as a separate tract. *Humble Oil & Refining Co.* v. *Railroad Commission*, 94 S. W. (2d) 1197 (Texas Civil Appeals, application for writ of error refused by Texas Supreme Court); *Wencker* v. *Railroad Commission*, 149 S. W. (2d) 1009 (Texas Civil Appeals, application for writ of error "dismissed, correct judgment," Texas Supreme Court).

(2) Where conditions have changed since the entry of a judgment cancelling a permit order, the Railroad Commission may grant a new permit and its findings that conditions have changed are presumptively valid. *Magnolia Petroleum Company* v. *New Process Production Company*, 129 Tex. 617, 104 S. W. (2d) 1106; *Stanolind Oil & Gas Co.* v. *Edgar*, 107 S. W. (2d) 631; *Stanolind Oil & Gas Co.* v. *Railroad Commission*, 107 S. W. (2d) 633; *Shell Petroleum Corporation* v. *Railroad Commission*, 86 S. W. (2d) 57 (Texas Civil Appeals, application for writ of error dismissed). The District Court's finding (R. 90) that conditions had so changed as to justify the Railroad Commission in granting the permit here under attack is sustained by evidence of the drilling of additional wells on adjacent tracts (R. 376, 395) so as to cause admitted drainage of Burford's lease (R. 243, 244) as well as notorious changes in pressure, water encroachment and heavy withdrawals of oil from the reservoir during the intervening years (R. 375).

(3) The pendency of a suit attacking another

permit, issued on February 1, 1934, to a predecessor in title of Burford, did not deprive the Railroad Commission of jurisdiction to consider and grant Burford's application. This early permit was granted without notice and hearing and was attacked on that ground by the Sun Oil Company in the suit in question (R. 195). Sun Oil Company immediately obtained an ex parte restraining order on May 30, 1934, against the drilling of any well under this permit (R. 204). This permit was thereupon abandoned by the permittee and no attempt was made to assert any rights under this permit. At the hearing before the Railroad Commission on Burford's application in 1938, it was stated without contradiction that the February, 1934, permit "has been abandoned long since" (R. 237, 292.) After the Burford permit was granted, the state court finally on November 29, 1939, entered a judgment setting aside the 1934 permit on the sole ground that the 1934 permit was entered "without notice and hearing as required by law," the judgment being without any adjudication on any other issue, and without prejudice to the rights of any of the parties "to apply to the Railroad Commission of Texas for other permits to drill oil and gas wells at such places on the tract of land above mentioned as they may desire." (R. 209, 210.)

Under the Texas law, since the 1934 permit was entered without notice or hearing, the Railroad Commission never acquired jurisdiction to grant the permit, and the court on appeal had no power to adjudicate the merits, but could only set aside the order for want of jurisdiction on the part of the Railroad

Commission to grant it. *Magnolia Petroleum Co.* v. *New Process Production Co.*, 129 Tex. 617, 104 S. W. (2d) 1106. In other words, the merits of the right to drill a well on this strip was not a matter pending before the court, and therefore the Railroad Commission's jurisdiction, upon proper notice and hearing, to pass upon a new application, was not ousted. Furthermore, the February, 1934 permit had been abandoned, and such abandonment gave the lease-owner the right to apply for a new permit, *McNeny* v. *Railroad Commission*, 96 S. W. (2d) 96, especially where conditions are shown to have changed. *Magnolia Petroleum Co.* v. *New Process Production Co., supra; Railroad Commission* v. *Wencker*, 161 S. W. (2d) 800 (Texas Civil Appeals).

(4) The Railroad Commission did not abuse its discretion in granting a permit to drill four wells instead of only one. This, of course, is a matter peculiarly within the discretion of the Railroad Commission. The evidence sustains the Railroad Commission's action. This strip was segregated from the Sun Oil Company lease in 1931 (R. 4), but no wells were permitted to be drilled upon the strip until 1939 (R. 39). In the meantime, beginning in 1932 (R. 263), Sun Oil Company had drilled seven wells on its lease, and Magnolia Petroleum Company had drilled six wells on its lease (R. 399), which had produced 100% of the recoverable oil originally under their leases (R. 286), all of which had been replaced by oil drained from other leases (R. 286, 347). It was conceded that both the Sun and the Magnolia wells were draining Burford's lease (R. 243-245).

The geologic conditions in this area, which is on the eastern edge of the East Texas field, are extremely erratic (R. 397), making it highly uncertain whether a location will be a producer or not. In fact, of the four wells drilled under the present permit, one has turned out to be a dry hole and another has turned out to be a pumper (R. 391). Under the Texas decisions, the relative density of drilling is not necessarily conclusive; the Railroad Commission may properly consider the length of time adjacent leases have been producing and the amount of oil already produced by them. *Humble Oil & Refining Co.* v. *Potter*, 143 S. W. (2d) 135 (Texas Civil Appeals).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals should be reversed.

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FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1942

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Petitioners

v.

SUN OIL CO., ET AL.

No. 496

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v.

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REPLY BRIEF FOR G. E. BURFORD, THE RAILROAD COMMISSION OF TEXAS, ET AL.

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REPLY BRIEF FOR G. E. BURFORD, THE RAILROAD COMMISSION OF TEXAS, ET AL.

I.

The action of the Circuit Court of Appeals in granting respondents' second petition for rehearing.

The cases cited by the respondents in support of the action of the Circuit Court of Appeals in granting respondents' second petition for rehearing do not control the present case. Those cases relate to the situation where the petition for rehearing is *filed*

promptly. In such cases, we concede that the court may act on the petition at any time during the same term of court. This case, however, presents a different question, viz., whether the Circuit Court of Appeals should have permitted the filing of the second petition for rehearing when it was not presented until after the period for applying for a writ of certiorari to this court had expired, and when it merely prayed for a reconsideration of the same issues of law and fact which had already been considered twice by the Circuit Court of Appeals, upon the original hearing and upon the first petition for rehearing.

We have been unable to find any cases determinative of this question, and none have been cited by the respondents or by the Circuit Court of Appeals. The question, therefore, must be decided on general principles. We do not think that the issuance of the mandate is important, but we do think that it is important that the period for filing a petition for certiorari had expired. The purpose behind the limitation of the period for filing a petition for certiorari to three months must have been to fix a time at the end of which judgments of the Circuit Courts of Appeals might be considered final. It would be an anomaly to hold that the Supreme Court had lost the power to review the judgment of the Circuit Court of Appeals, because of the expiration of the three months' period, but that the Circuit Court of Appeals retained the power to review its own judgment.

Nor are there any equitable grounds to justify the granting of respondents' second petition for rehearing. The issues decided against respondents by the Circuit Court of Appeals in its first judgment all depended on the interpretation of this Court's opinions in the *Rowan & Nichols cases*, 310 U. S. 573 and 311 U. S. 570, and diligence would certainly have required that respondents should seek a review of the rulings of the Circuit Court of Appeals by this Court. The fortuitous circumstance that a different set of judges of the same Circuit Court of Appeals later decided the same issues in a manner contrary to the first judgment in this case does not change the nature of the issues or excuse respondents' want of diligence in failing to apply for a writ of certiorari. We submit that Judge McCord was correct in his conclusion that respondents' "second petition for rehearing came too late and should not have been granted." See 130 F. (2d) 10, 19.

II.

The validity of the Railroad Commission's order under the Fourteenth Amendment.

The District Court held that the Railroad Commission's order was valid under the Fourteenth Amendment (R. 90-91). The Circuit Court of Appeals in its first opinion sustained this conclusion (124 F. (2) at p. 470). In its second opinion, the Circuit Court of Appeals specifically stated that it

had not withdrawn its holding that the order was valid so far as any claims under the United States Constitution are concerned. (130 F. (2d) at p. 19). The respondents, however, by their cross-petition have attacked this holding, and it will, therefore, be necessary to reply to this contention briefly.

The spacing rule (Rule 37) is a part of the general scheme of regulation of the production of crude petroleum which was thoroughly considered by this Court in the *Rowan & Nichols* cases, 310 U. S. 573 and 311 U. S. 570. Permits to drill wells as exceptions to the spacing rule may be granted either to prevent waste or to protect vested rights. (R. 111) It is submitted that the facts in this case amply justify the conclusion reached by the District Court and also by the Circuit Court of Appeals that the action of the Railroad Commission was not in violation of the Fourteenth Amendment.

In the first place, the evidence clearly shows that no property of the respondents is being confiscated by the order attacked. There is no proof whatever that the respondents will not recover their fair share of the oil; in fact, the evidence affirmatively shows that they have already recovered what they are legally entitled to demand. The Sun Oil Company has seven wells on its lease and Magnolia Petroleum Company has six wells on its lease, which were drilled beginning in 1932 (R. 263) and which have since produced at least 100% of the recoverable oil originally beneath their leases. (R. 286). In spite of this large production, the respondents' wells are

as productive as ever, because the oil which has been produced has all been replaced by other oil which has been drained from other leases. (R. 286, 347). Since the respondents have already produced the equivalent of the recoverable oil originally beneath their leases and will probably produce for a long time in the future, their property has certainly not been confiscated. *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069; *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73.

The respondents' assertions that by reason of the drilling and production of oil from the wells on Burford's strip the "Sun will lose between 70,000 and 100,000 barrels of oil which its wells would otherwise produce and Magnolia's loss of oil to the Burford locations will be about 50% as much as Sun's loss" (Respondents' Brief, p. 7) might be misleading if the relevant facts are not kept in mind. The substance of what the witness was saying was that the drainage advantage which Sun and Magnolia have enjoyed during all the years when Burford has had no wells on his tract will be diminished to the extent stated. (R. 369, 377). In other words, the admitted drainage of Burford's tract by the Sun and Magnolia wells (R. 243-245) will be at least decreased if not prevented altogether, so that Sun and Magnolia will hereafter have to share some of the production with Burford. This obviously does not show confiscation but merely the deprivation of an unfair advantage which has existed for many years.

Nor, from the point of view of the advantage to Burford from the drilling of the wells, can the Railroad Commission's order be deemed unreasonable. While the drilling of four wells would give Burford an advantage in density, the Railroad Commission is entitled to consider the fact that prior to 1939 Burford was not allowed to drill any wells and, of course, had no production at all from his strip. The evidence also shows that this strip is on the eastern edge of the oil field where geological conditions are very irregular (R. 397). One of the Burford wells is a dry hole and another is a pumper. (R. 391). The Railroad Commission, of course, retains its power of continuous supervision and, under the facts, it cannot be said that it has given Burford an unfair advantage.

The respondents lay some stress on their offer to pool one or both of their leases with the Burford lease. (Respondents' Brief, p. 8). This offer, it should be noted, is purely on the basis of the *future* production. (R. 158, 19). In other words, Burford would be given no opportunity to make up for lost drainage over the past ten years. Even if the offer to pool were on a fair basis, there would be no obligation on Burford's part to pool his acreage with respondents. The Texas statute, Vernon's Annotated Texas Civil Statutes, Article 6014(g), provides that "it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership." The

*Copied infra, p. 21

Railroad Commission, therefore, had no power to compel a pooling of the separate tracts.

The respondents' claim that the Railroad Commission should have adjusted the allowable production on an acreage basis is the same contention which was asserted and overruled by this court in the *Rowan & Nichols cases*, 310 U. S. 573, 311 U. S. 570.

III

The alleged duty of the federal courts to determine the validity of the Railroad Commission's order under the state law by applying an independent judgment to the facts.

The respondents, Sun Oil Company and Magnolia Petroleum Company, in their brief (pp. 55-72) have taken the position squarely that under the Texas law the courts must exercise an "independent judgment" as to the validity of a Rule 37 order of the Railroad Commission, that this means that the "substantial evidence" rule is not applicable, and that the question for the court is whether, *in its own independent judgment*, the order is proper —not whether the action of the Railroad Commission has reasonable support in substantial evidence. In other words, the respondents contend that the state law is that the court must put itself in the place of the Commission and decide as an original proposition whether on the evidence it hears the

court would enter the same order as that entered by the Railroad Commission. If in its independent judgment the order is not proper, the court must strike down the order. Respondents further say that this course is obligatory upon the federal courts (where jurisdiction rests on diversity of citizenship) as well as the state courts. (Respondents' Brief, pp. 56-63).

While it is not certain that the respondents have adopted in all respects the correct interpretation of the decisions of the Supreme Court of Texas in the cases of *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022, and *Cook Drilling Co.* v. *Gulf Oil Corporation*, 161 S. W. (2d) 1035*, the position taken by respondents makes it plain beyond any doubt that the present case is of the type where the equitable powers of a federal court should not be exercised. If respondents are correct in their position, the federal courts, at the instance of aggrieved leaseholders (at least in cases involving diversity of citizenship) must assume the duties of the Railroad Commission in determining when oil wells may be drilled as exceptions to the Railroad Commission's spacing rules. We submit that such work is no proper part of a federal court's functions.

In the present case, federal jurisdiction is not denied. But the existence of jurisdiction does not mean that the federal courts must undertake to determine all questions of state law which are involved; in proper cases the court itself may impose a limita-

*Compare Note, 21 Texas Law Review 69, 72 (1942)

tion on the exercise of its own jurisdiction where the remedy sought is an injunction against actions or orders of state officers. *Hawks & Hamill*, 288 U. S. 52; *Cavanaugh* v. *Looney*, 248 U. S. 453; *Massachusetts State Grange* v. *Benton*, 272 U. S. 525; *Pennsylvania* v. *Williams*, 294 U. S. 176. This judicial self-limitation has been held to be particularly appropriate where rights are asserted under the state law and there exists an adequate and speedy remedy in the state courts. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478.* And as applied specifically to the complicated situation involved in the regulation of the production of oil from the East Texas oil field, this court has held that the issues of state law will not be tried in the federal courts if they require a broader inquiry than is demanded in testing the validity of such orders under the Fourteenth Amendment, and that for the trial of such issues the parties are relegated to the state courts. *Rowan & Nichols cases*, 310 U. S. 573 and 311 U. S. 570.

A consideration of the nature of the issues which are presented under the state law in testing the validity of a Rule 37 order of the Railroad Commission, in the light of the decisions of the Supreme Court of Texas in the cases of *Railroad Commission*

*See Note 54 Harvard Law Review, 1379 (1941); Note 50 Yale Law Journal, 1272 (1941); Isseks, "Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials," 40 Harvard Law Review, 969 (1927).

v. *Shell Oil Co.*, 161 S. W. (2d) 1022, and *Cook Drilling Co.* v. *Gulf Oil Corporation*, 161 S. W. (2d) 1035, only tends to confirm the wisdom of the conclusions which were reached by this Court in the *Rowan & Nichols cases* and to fortify our position that the federal courts should not undertake to pass on the validity of such orders under the state law. The same intricate and highly technical plan of regulation of the production of crude petroleum is involved in this case as in the *Rowan & Nichols cases*. In those cases an operator was seeking to enjoin the enforcement against it of a method of proration on the ground that it was substantially a per-well allocation which was unfair because of the density of drilling permitted on other tracts. In the present case, two operators are seeking to cancel an order permitting the drilling of wells on an adjacent tract because, through the per-well method of allocation, it is claimed that the permittee will be allowed to produce more than his "fair share" of the oil. The present case is simply an attack upon the same method of regulation as that involved in the *Rowan & Nichols cases*, but from a different angle. The proration orders and the well spacing orders have long been recognized as integral parts of the same scheme of limitation of production for the purpose of the conservation of natural resources. See *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069; *Gulf Land Co.* v. *Atlantic Refining Co.*, 131 Tex. 59, 131 S. W. (2d) 73; Walker, "The Problem of the Small Tract under Spacing Regulations," 17 Tex. L. Rev. 157 (Supp. Bar Association Proceed-

ings); Ely, "The Conservation of Oil," 51 Harv. L. Rev. 1209. The same reasons of policy which would impel the federal courts to refuse to supervise the exercise of the state's regulatory powers in proration cases would therefore also apply to well-spacing, or Rule 37, cases.

Additional considerations which are peculiar to Rule 37 cases lead to the same conclusion. The appeal provided by the Texas statute (Vernon's Annotated Texas Civ. Statutes, Art. 6049c, § 8) is a special statutory proceeding to which the rules applicable to ordinary civil suits at law or in equity do not apply. *Alpha Petroleum Co.* v. *Terrell*, 122 Tex. 257, 59 S. W. (2d) 364; *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73. Under the state review statute, any "interested person affected by" any Railroad Commission order relating to oil or gas may file a suit to test the validity of the order. (Vernon's Annotated Texas Civil Statutes, Art. 6049c, sec. 8).* In Rule 37 cases the term "interested person affected by" a Railroad Commission order has been construed to mean any operator whose lease is adjacent to the permittee's lease. To set the order aside, it is not necessary for the complaining party to show that he is not recovering or will not recover his fair share of the oil, or even that the proposed wells will actually drain any oil from his lease. *Railroad Commission* v. *Shell Oil Co.*, 165 S. W. (2d) 503 (Tex. Civ. App.); *Railroad Commission* v. *Gulf Production Co.*, 115 S. W. (2d) 505 (Tex. Civ. App.) affirmed 134 Tex. 122,

*Copied infra, p 24

132 S. W. (2d) 254. It has been specifically held that in the statutory suit it is not necessary for the complaining party "to show injury to its private property rights sufficient to call for the intervention of the court of equity." *Spear* v. *Humble Oil & Refining Co.*, 139 S. W. (2d) 212 (Tex. Civ. App., writ of error "dismissed, correct judgment" by Texas Supreme Court).

To permit the Texas statutory proceedings to be taken to the federal courts will be to require the federal courts to go through a process which is foreign to any presently recognized legal or equitable method of trial in the federal courts. We doubt that, as it has been interpreted by the Texas courts, the statutory method of review is judicial in character, since it in reality requires the court as an original proposition to determine administrative matters, i. e., when special exceptions to a general spacing rule should be permitted. This is the interpretation placed upon the Texas cases by the respondents in their brief, at pages 71-72. If this interpretation of the Texas holdings is correct, then the federal courts would have no jurisdiction of the statutory proceedings because they are not judicial in character. Compare *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428. But regardless of the question of jurisdiction, the more orderly procedure would certainly be for the affected parties to seek a determination of the validity of the orders of the Railroad Commission under the state law in the state courts, reserving a right to resort to the federal courts for protection against any alleged violations of the United

States Constitution. Compare *Prentis* v. *Atlantic Coast Line R. R.*, 211 U. S. 210.

There is no question of the adequacy of the remedy which is afforded to the complaining party in the state courts. The Texas statutes provide for expeditious hearings in which prompt relief both in the trial and appellate courts is afforded. See Vernon's Annotated Texas Civil Statutes, Article 6049c, sections 8, 10, and 11.* Even a hasty examination of the reported opinions of the Texas Courts of Civil Appeals and the Texas Supreme Court during the last ten years shows that more than one hundred opinions have been written in Rule 37 cases and that there has been little reluctance on the part of the courts to strike down the Railroad Commission's orders.

The fact that federal jurisdiction in this case rests in part on diversity of citizenship instead of resting entirely upon a federal question, as in the *Rowan & Nichols cases*, should make no difference in the result which is reached. The same reasons of policy apply in one case as much as the other. In order to make a distinction upon this ground, Judge Hutcheson in the *Selby case*, 128 F. (2d) 334, at page 337, relies upon language appearing in this court's first opinion in the *Rowan & Nichols case*, 310 U. S. 573, at page 580, which was later withdrawn by the court in overruling the petition for rehearing. 311 U. S. 614. There is certainly no reason to believe that there exists any prejudice against foreign citizens or corporations in the Texas courts;

*Copied infra, pp. 24-27

in fact, the large number of cases which are found in the reported decisions of the Texas courts in which decisions favorable to foreign corporations in Rule 37 cases have been rendered affirmatively removes the possibility of any such contention being made. The case of *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, is merely authority for the existence of federal jurisdiction as against the contention that the suit is one against the state and does not afford any support for Judge Hutcheson's position that in diversity cases the federal courts must necessarily try the issues of state law in the "statutory suit" in the same way the state courts would try such issues.

If any distinction is to be drawn, it would seem that there is less reason for the federal courts to undertake to pass upon issues of state law involving administrative regulations in diversity cases than in cases where jurisdiction rests upon the assertion of a federal question. Mr. Justice Cardozo's language in *Hawks* v. *Hamill*, 288 U. S. 52, 61, is apposite here:

"Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. *Massachusetts State Grange* v. *Benton, supra; Stratton* v. *St. Louis S. W. Ry. Co.*, 284 U. S. 530; *Matthews* v. *Rodgers*, 284 U. S. 521. There must be relucance even greater where the rights are strictly local; jurisdiction having no other basis than the accidents of residence. The need is

clamant in such circumstances for cautious hesitation."*

IV.

The validity of the Railroad Commission's order under the state law.

The respondents have not cited any cases dealing expressly with the question of substantial compliance with the spacing rules of the Railroad Commission, except the cases already cited by us which hold that if the area of the tract in question is larger than the area contemplated by the spacing rules, the Railroad Commission may consider the tract as a separate tract, even though it is too narrow to comply with the spacing distances. *Humble Oil & Refining Co.* v. *Railroad Commission*, 94 S. W. (2d) 1197 (Tex. Civ. App., writ of error refused by Texas Supreme Court); *Wencker* v. *Railroad Commission*, 149 S. W. (2d) 1009 (Tex. Civ. App., writ of error "dismissed, correct judgment" by Texas Supreme Court).

The authorities cited by the respondents in their brief do not even refer to the question of substantial compliance with the Railroad Commission's spacing rules. Apparently the question was not raised in any of these cases. Some of the decisions cited by the respondents were decided on an entirely different point, as in the case of *Sun Oil Company* v. *Railroad*

*See Frankfurter, "Distribution of Judicial Power between United States and State Courts," 13 Cornell Law Quarterly, 499 (1928); Friendly, "Historic Basis of Diversity Jurisdiction," 31 Harvard Law Review, 483 (1928).

Commission, 68 S. W. (2d) 609, which involved a permit which was void because issued without notice and hearing and which, furthermore, was void because issued on a strip to which the Texas Supreme Court held the permittee had no title. (84 S. W (2d) 693). Some of the cases cited are merely cases upholding the Railroad Commission's discretionary power to *refuse* permits. *Smith* v. *Shabay*, 83 S. W. (2d) 719; *Railroad Commission* v. *Wood*, 95 S. W. (2d) 1328; *Smith* v. *Stewart*, 68 S. W. (2d) 627, affirmed 83 S. W. (2d) 945. Other cases involve permits which were held to be valid. *Tide Water Associated Oil Co.* v. *Railroad Commission*, 120 S. W. (2d) 544; *Magnolia Petroleum Co.* v. *Railroad Commission*, 127 S. W. (2d) 230. We see no point in discussing these cases in detail. In none of them is the question of substantial compliance discussed or even referred to. None of them is as recent as the case of *Wencker* v. *Railroad Commission*, 149 S. W. (2d) 1009, which upholds the "substantial compliance" rule.

On the issue of res judicata, the respondents insist that the judgment cancelling the Hammonds permit in Cause No. 54,769, in 1935, forever precluded the drilling of any oil wells upon the strip in question, if considered as a separate tract. (Respondents' Brief, pp. 25-33). The cases recited by respondents, however, show that the Texas law is that the Railroad Commission has the power to grant a new permit, even though a prior permit has been set aside upon same tract, upon the showing of changed conditions. For example, in *Shell Petroleum Corp.* v. *Railroad*

Commission, 86 S. W. (2d) 57, 59 (Writ of Error dismissed), the court said:

> "We are not to be understood as holding that Robinson is permanently denied the right to additional wells if authorized by the Railroad Commission under changed conditions."

This is likewise the holding of the Supreme Court of Texas in *Magnolia Petroleum Company* v. *New Process Production Co.*, 129 Tex. 617, 104 S. W. (2d) 1106. The cases of *Edgar* v. *Stanolind Oil & Gas Co.*, 90 S. W. (2d) 656, and 98 S. W. (2d) 222 were modified by the later holding of the Supreme Court in the *New Process Case*, *supra*, as is recognized by the later opinion in *Stanolind Oil & Gas Co.* v. *Edgar*, 107 S. W. (2d) 631. The respondents' arguments as to whether the conditions have changed are all related to the situation of the Burford tract, when considered together with the Sun Oil Company tract, and not on the basis of the Burford tract as a separate tract. When so considered, the evidence of the drilling of additional wells and the other facts heretofore referred in our original brief, amply support the finding of the District Court that there had been material changes in conditions. (R. 90).

In support of their proposition that the pendency of Cause No. 53,915 in the state court deprived the Railroad Commission of jurisdiction (Respondents' Brief, p. 33-36) to consider Burford's application, the respondents reply upon the cases of *Barnsdall*

Oil Co. v. *Railroad Commission*, 90 S. W. (2d) 663, and *McNeny* v. *Railroad Commission*, 96 S. W. (2d) 96. These cases, however, were decided prior to the decision of the Supreme Court in *Magnolia Petroleum Co.* v. *New Process Production Co.*, 129 Tex. 617, 104 S. W. (2d) 1106, which held that in a suit to set aside a Railroad Commission order which was entered without notice and hearing, the court obtained jurisdiction only for the purpose of setting aside the order for failure to comply with procedural requirements and did not obtain jurisdiction to determine the merits of the right to drill a well upon the tract in question. Since the permit in Cause No. 53,915 was attacked and was eventually set aside upon the ground that it was issued without notice and hearing, the pendency of this suit did not deprive the Railroad Commission of the right to consider Burford's application upon the merits. Furthermore, the permit involved in that case had long since been abandoned, and such abandonment would give the leaseowner the right to apply for a new permit. *McNeny* v. *Railroad Commission*, 96 S. W. (2d) 96; compare *Railroad Commission* v. *Wencker*, 161 S. W. (2d) 800.

With regard to the action of the Railroad Commission in granting four permits instead of only one permit, the Railroad Commission was entitled to take into consideration the fact that the owner of the narrow strip in question had been prevented from producing any oil from his tract for about eight years, during which time oil had been produced in large quantities from the adjacent tracts. *Humble Oil &*

Refining Co. v. *Potter*, 143 S. W. (2d) 135 (Tex. Civ. App.) The respondents' position seems to be that they should be allowed to continue to produce without interference by Burford, although they have already produced more than the equivalent of the recoverable oil in place beneath their leases, but, on the other hand, they contend that Burford should be strictly limited by the Railroad Commission to the production of the oil which is in place under his strip. (See Respondents' Brief, pp. 36-40). In other words, the respondents' seem to contend that one rule of property should apply to their leases and that an entirely different rule of property should apply to the Burford lease. If the rule of property is that a person should be limited to the amount of oil beneath his lease, the respondents certainly have no right to complain since they have already produced more than this amount. (R. 286, 347). If, on the other hand, they claim to have the right, because of their favorable position in the field, to continue to drain oil in excess of the amount of recoverable oil originally beneath their lease, then Burford should be entitled to the same right. Because of the variable conditions in the field, one of Burford's wells has turned out to be a dry hole and another has turned to be a pumper (R. 391) and any prediction as to the exact amount of oil which will be produced by Burford's wells is therefore largely a matter of speculation. Under the circumstances, the Railroad Commission under the Texas law did not abuse its discretion in allowing Burford four locations upon the strip in question.

CONCLUSION

For the reasons stated, it is respectfully prayed that the judgment of the United States Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

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APPENDIX

Texas Statutes relating to the power of the Railroad Commission to promulgate and enforce well-spacing orders and appeals to the courts from such orders. All Statutes here copied are to be found in Vernon's Annotated Texas Civil Statutes.

"Article 6014. 'Waste'

"The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

". . .

"(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

"(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership."

"Article 6029. 'Rules and Regulations'

"The Commission shall make and enforce rules, regulations or orders for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, including rules, regulations or orders for the following purposes:

"(1) To prevent the waste, as hereinbefore defined, of crude petroleum oil and natural gas in drilling and producing operations and in the storage, piping and distribution thereof.

". . .

"(3) For the drilling of wells and preserving a record thereof.

"(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

". . .

"(8) It shall do all things necessary for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, and shall make and enforce such rules, regulations or orders as may be necessary to that end.

"(9) To provide for the issuance of permits, tenders, and other evidences of permission when the issuance of such permits, tenders, or permission is necessary or incident to the enforcement of its rules, regulations, or orders for the prevention of waste."

"Article 6036a. 'Notice of Hearing'

"No rule, regulation or order shall be adopted by the Commission under the provisions of this Act or of Title 102 of the Revised Civil Statutes of Texas, 1925, as amended, dealing with the conservation of oil and gas and the prevention of the waste thereof, except after hearing upon at least ten (10) days notice given in the manner and form prescribed by the Commission; provided that in case an emergency is found by the Commission to exist which, in its judgment requires the making of a rule, regulation or order without notice and hearing, such emergency rule, regulation or order may be promulgated and shall have the same validity as if a hearing with respect to the same had been held after due notice. The emergency rule, regulation or order authorized herein shall remain in force no longer than fifteen (15) days from its effective date, and, in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation or order becomes effective.

"The Commission may, without prior notice, revoke any rule, regulation or order promulgated by it; and it may, without prior notice, amend the same, provided the subject matter of the amendment was considered at the hearing made the basis for such rule, regulation or order. The renewal or extension of any rule, regulation or order shall be based upon a hearing after proper notice, subject to the provisions of this Section with reference to emergency rules, regulations and orders."

"Article 6046. 'Rules for prevention of waste'

"The Commission, when necessary, shall make and enforce rules and regulations either general in their nature or applicable to particular oil fields for the prevention of actual waste of oil or operations in the field dangerous to life or property.

Article 6049c. Oil and gas conservation, powers and duties of Railroad Commission

"Section 8.

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

"Section 10.

"No injunction, whether temporary restrain-

ing order, temporary injunction, permanent injunction, or other character of injunctive relief, shall be granted against the Railroad Commission, its members, agents, and representatives, to restrain it or them from enforcing any rule, regulation, or order made and promulgated by the Railroad Commission under the conservation statutes of this State, relating to oil and gas, or any amendments thereof, or restrain the enforcement of any such statute, except after notice to the Commission and a hearing as hereinafter provided; provided that when a petition or application is filed asking for any such character of temporary injunctive relief, the clerk of the court in which such petition or application is filed shall issue notice to the Commission in writing, which notice shall contain the docket number, style, and a brief statement of the nature of such suit, and such notice shall be served on the Commission by delivering a copy of such citation to the Commission or any member thereof, or to the Secretary thereof, in Travis County, for the service of other citations, and five (5) days from and after the service of such notice a hearing may be had on such application; provided further that the rule, regulation, or order complained of shall be taken as prima facie valid and the use and introduction of the verified petition of plaintiff shall not be sufficient to overcome the prima facie validity of the rule, regulation, or order complained of, or to empower the court to grant any injunctive relief against the enforcement of said rule, regulation, or order; provided further, that before any order granting any character of injunctive relief against any such statute or against any such rule, regulation, or order of the Commission shall become effective the plaintiff shall be re-

quired by the court to execute a bond with good and sufficient sureties in an amount to be fixed by the court reasonably sufficient to indemnify all persons when the court may find from the facts proven will suffer damages by reason of the violation of the statute, rule, regulation, or order complained of, such persons to be named in the order of the judge when the amount of the bond is fixed by the court and entered of record; provided further, that the finding of the court that any party is likely to suffer damage shall not be admissible as evidence of damages in any suit on such bond. . . . "

"Section 11.

"After notice and hearing is had upon application for any such injunctive relief either party to said suit has the right of appeal from any judgment or order therein granting or refusing any injunction, whether temporary restraining order, temporary injunction, permanent injunction, or other character of injunctive relief, or from any order granting or overruling a motion to dissolve any such injunction. Said appeal shall at once be returnable to the appellate court and said action so appealed shall have precedence in said appellate court over all cases, proceedings, and causes of a different character therein pending. The provisions and requirements of Article 4662, Revised Civil Statutes of 1925, relating to temporary injunctions shall likewise apply to appeals from any order granting or refusing a temporary restraining order, or granting or overruling a motion to dissolve such temporary restraining order, under the provisions of this Act. In the Court of Civil Appeals such court shall immediately and at as

early a date as possible decide the questions involved therein; and in the event any question or questions shall be certified to the Supreme Court, or writ of error thereto be requested or granted, it is here made the duty of the Supreme Court immediately to set down said cause for hearing and decide the cause at as early a date as possible, and such cause shall have precedence over all other causes, proceedings and causes of a different character in such court. . . . "

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL,
Petitioners

v.

SUN OIL CO., ET AL

No. 496

SUN OIL CO., ET AL
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v.

G. E. BURFORD, ET AL,

No. 528

O. L. HASTINGS, ET AL,
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SELBY OIL AND GAS COMPANY, ET AL

DISCUSSION OF QUESTIONS OF THE COURT SUBMITTED IN ITS ORDER RESTORING CASES TO THE DOCKET FOR REARGUMENT

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DISCUSSION OF QUESTIONS OF THE COURT SUBMITTED IN ITS ORDER RESTORING CASES TO THE DOCKET FOR REARGUMENT

I. (a)

Is the Court proceeding provided by Texas Law for Judicial Examination of orders of the Texas Railroad Commission a "case or controversy" with-

in the meaning of Article III of the United States Constitution?

Sections 8, 10 and 11[1] of Article 6049c, Vernon's Texas Civil Statutes (Acts 1931, 42nd Texas Leg., 1st C.S., Ch. 26; as amended, Acts 1932, 42nd Texas Leg., 4th C.S., p. 3, Ch. 2; as amended, Acts 1935, 44th Leg., Chs. 28 and 76) set forth the statutory procedure to review orders and regulations of the Texas Railroad Commission.

By section 8 any *interested person* affected by an order and who is *dissatisfied* may file suit to *test its validity*. As originally enacted (Acts 1931, 42nd Leg., 1st C.S., Ch. 26) those dissatisfied could ask the court to annul, correct, or modify the order. As the statute presently reads the complaining party may test or determine the validity of the order.

In order for this proceeding to fall within the special competence of a federal district court it must provide for the adjudication of an actual "case or controversy" within the meaning of those terms employed in Article III of the United States Constitution. *Muskrat* v. *United States*, 219 U. S. 346; *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716; *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249.

What is a "case or controversy" to which the judicial power of the United States extends? We see no reason for not measuring the Texas proceeding by the standards set forth in the oft-cited case of *Aetna*

[1]Quoted in appendix

Life Insurance Company v. *Haworth*, 300 U. S. 227. There the court speaking through Mr. Chief Justice Hughes summarized the pertinent cases announcing the following rules:

> 1. There is no appreciable distinction between the terms "case and controversy."
>
> 2. *The judicial power does not extend to a determination of abstract questions.*
>
> 3. The court will not decide hypothetical questions.
>
> 4. The controversy must touch the legal relations of *parties who have adverse legal interests.*
>
> 5. *The matter must be real and substantial* admitting of specific relief through a decree of conclusive character.

The character of the proceeding under the Texas statute must be determined not alone from the bare language of the statute. We must also examine the opinions of the Texas courts vitalizing that language.

To begin with the proceeding "*is a special statutory action to enforce a right which exists only by statute and not under the Constitution or at common law.*" *Gulf Land Company* v. *Atlantic Refining Company*, 134 Tex. 59, 131 S. W. 2d 73. The statute authorizes a determination of the *validity* of the order involved. Now it is hardly open to argument that if by this the statute authorizes a determination merely of the abstract question of validity vel

non without regard for the manner in which the administrative action impinges upon some superior legal right of the complaining party, it is without the province of a federal district court. Such is the doctrine of the *Muskrat* case. See also the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288. 347'

But a "dissatisfied," "interested person" seeking a judicial determination of the validity of an order of the Texas Railroad Commission need show no injury under Texas law. *Spear* v. *Humble Oil and Refining Company* (Civ. App.) 139 S. W. 2d 212, writ of error dismissed by Texas Supreme Court. Indeed, according to the latest expression of the Texas courts the dissatisfied plaintiff need not even

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'An excellent statement of the rule is that of Judge Lindley speaking for the 7th Circuit Court of Appeals in Ex-Cell-O Corporation v City of Chicago, 115 Fed. 2d 627:

> "The courts may, at the suit of proper parties, determine whether specific acts are unconstitutional or invalid under the law. They may, under similar circumstances, determine whether actions of administrative officials in interpretation and administration of legislative acts violate the constitutional or legal rights of the suitor. In either instance the power of the court is the same, namely: To determine whether constitutional provision or legislative enactment is transcended either by the legislative act itself or by the administration thereof. This power of judicial determination is delicate in character, one to be exercised with caution and care, for it may result in disapproval of acts of the legislative department or of actions of the executive department, both co-ordinate branches of the government. This care, this caution has been proverbially observed by the courts, lest in their zeal to prevent what they deem unjust, they exceed their judicial authority, assert an unwarranted superiority over their co-ordinate governmental branches and invade fields of policy preserved to the legislative arm or the realm of administrative discretion lodged in the executive branch. Obviously such determination may not be had at the suit of any and all members of the public or in an ex parte proceeding. It can be secured only at the suit of one directly and not remotely interested."

show that an oil well, the validity of the permit for which he is litigating, will actually drain any oil from him. *Railroad Commission* v. *Shell Oil Company* (Tex. Civ. App. 1942) 165 S. W. 2d 503, writ of error refused by Texas Supreme Court December 9, 1942[1].

How different from the definition of a justicable "case or controversy" so far as the federal courts are concerned! In this connection the language of this Court in *Massachusetts* v. *Mellon*, 262 U. S. 447, 488, stands in striking contrast:

> "We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. *The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.*" (Emphasis Supplied.)

[1] Rule 483 of the Rules of Practice and Procedure promulgated by the Texas Supreme Court provides in part:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Su-

In *Old Colony Trust Company* v. *Commissioners*, 279 U. S. 716, 724, this court held that the term "case" as used in Article III of the United States Constitution implies the existence of *adverse parties* whose contentions are submitted to the court for adjudication. See also *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, where this court declined to pass on the case because there were no *adverse* parties.

Under the special statutory proceeding provided by Article 6049c of the Texas statutes of Texas Railroad Commission has been held the only necessary party defendant in a suit brought by one dissatisfied. The land-owner securing the permit to drill is not a necessary party under Texas law in the very suit brought to set aside his permit. *Magnolia Petroleum Company* v. *Edgar*, (Civ. App.) 62 S. W. 2d 359, writ of error refused by Texas Supreme Court.

There are substantial grounds for doubting that a special statutory suit that may be brought by one who need show no injury to his own property against the administrative body granting his neighbor a

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preme Court will refuse the application with the docket notation.. 'Refused'."

'See also Fairchild v. Hughes, 258 U. S. 126; U. S. v. West Va., 295 U. S. 463; and the following cases arising under the Federal Declaratory Judgment Statute (48 Stat. 955, 28 U.S.C.A. § 400) Ashwander v. T.V.A., 297 U. S. 288; Ohio Cas. Ins. Co. v. Marr, 98 Fed. 2d 973, C.C.A. 10th, Cert. Den., 305 U. S. 675; Smith v. Blackwell, 115 Fed. 2d 186 and Ex-Cello Corp. v. City of Chicago, C.C.A. 7th 117 Fed. 2d 627. In Treemond Co. v. Schering Corp., C.C.A. 3rd 122 Fed. 2d 702, we find the court in a patent infringement case saying "There can be no doubt that an actual controversy does not exist until the patentee makes some claim that his patent is being infringed"

permit which may be prosecuted without the neighbor being a party and whose purpose is solely to "test the validity" of his neighbor's permit, presents a "case or controversy" within the meaning of Article III of the United States Constitution. It is submitted that the statute as construed by Texas courts permits one dissatisfied to invoke judicial determination of the abstract question of validity vel non of his neighbor's well spacing permit; and that such review is outside the province of a federal district court.

A somewhat related problem is that involved in the inquiry whether the Texas statute provides a new substantive right or a mere procedural remedy. The principle is that stated in the leading case of *California Prune and Apricot Grower's Assn.* v. *Catz American Company*, C.C.A. 9th, 60 Fed. 2nd 788, 85 A.L.R. 1117:

> "It is undoubtedly true that a federal court in proper cases may enforce state laws; but this principle is applicable only when the state legislation invoked, creates or establishes a substantive or general right. * * * *The federal courts are without jurisdiction or power to enforce a purely remedial or procedural state law.*" (Emphasis supplied).

Applying this principle the *Catz case* held that a United States district court in California, whose jurisdiction was invoked by reason of diversity of citizenship, had no power to enforce the California arbitration statute. In support of its holding the

court cited *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491; *Henrietta Mills* v. *Rutherford County, N. C.*, 281 U. S. 121; *Matthews* v. *Rogers*, 284 U. S. 521 and *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109.

In the *Matthews case* this Court said:

> "While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by federal courts of equity if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies, nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the federal courts, where the legal remedy is adequate."

It is submitted that it is likewise true that under the guise of enforcing Article 6049c of the Texas statutes the jurisdiction of a federal district court may not be enlarged so as to dispense with the necessity of a plaintiff showing substantial injury to himself in the enforcement of an allegedly illegal administrative order. It is not enough for the plaintiff to say that in the instant case he has shown or can show injury. The question is the nature of the proceeding authorized by the Texas statute and not whether an individual plaintiff may in a particular case show more than the state law requires.

The test for the invocation of the rule is whether Sections 8, 10, and 11 of Article 6049C of the Texas

statutes provide new substantive rights or merely procedural remedies. Quite obviously the Texas statute purports nothing more than an expeditious remedy, not existing under the Constitution or at common law (See *Gulf Land Company* v. *Atlantic Refining Company*, supra). The caption of the original enactment provides that it is,

> "An Act * * * *providing a method* whereby any interested party affected by any rule or order made or promulgated by the Commission, shall have the right to institute a suit in Travis County, Texas, against the Commission and seek relief such as may be necessary, *providing the procedure in respect thereto*, * * * (Emphasis supplied; H. B. 25, Acts 42nd Texas Leg., 1st C. S., Ch. 26, p. 46)."

That of the last amendment in 1935 is,

> "An Act * * * providing for suits to test the validity of the oil and gas conservation laws and the rules, regulations or orders thereunder, *and procedure n such suits* * * * (Emphasis supplied; Acts 44th Leg., R. S., Ch. 76, 180.)

The Texas statute provides that an interested person may sue to test the validity of an order of the Texas Railroad Commission. Section 8. In somewhat similar terms Congress provided that in cases of actual controversy an interested party may file a petition for a declaration of rights and other legal relations, such declaration to have the force and effect of a final judgment. 48 Stat. 955, 28 U.S.C.A. § 400. *Aetna Life Insurance Co.* v.

Haworth, 300 U. S. 227, and a host of cases following that decision, hold that this, the Federal Declaratory Judgment Act, creates no new substantive right but is procedural and remedial only. There would appear to be no basis for distinction.

It is submitted that since the Texas statute creates new procedural rights only it is not cognizable by the federal district courts.

The respondents may, however, contend that assuming that Sections 8, 10, and 11 of Article 6049c are purely procedural, nevertheless, the Texas law recognizes certain substantive rights of respondents which respondents by reason of diversity of citizenship are entitled to enforce in the federal courts.

This calls for an examination of their substantive rights. Let us first consider them as they stood in the absence of statutory regulation under the police power. At common law the rule in Texas recognized the ownership of oil and gas in place. That is, each landowner was held to be the owner of the oil and gas beneath his land. *Texas Company* v. *Daugherty*, 107 Tex. 226, 176 S. W. 717, LRA 1917F, 989. But this rule was qualified by a correlative doctrine, the "law of capture".[6] *Stephens County* v. *Mid-Kansas Oil and Gas Co.*, 111 Tex. 160, 254 S. W. 290, 29 A.L.R. 566; *H. & T. C. Ry. Co.* v. *East*, 98 Tex. 146, 81 S. W. 279, 66 L.R.A. 738, 107 Am. St. Rep. 620, 4 Ann. Cas. 827; *Prairie*

[6]See Walker, The Rule of Capture, 13 Tex. L. Rev. 391.

Oil & Gas Co. v. *State* (Tex. Comm. App.) 231 S. W. 1088, 1089. The meaning of the two rules was simply this: one had the right to produce all the oil and gas he could that would flow from the wells on his land regardless of its origin, limited only by the identical right of his neighbor to exercise the identical privilege of drainage by the same "law of capture." An adjoining landowner could not complain of drainage from wells drilled on adjacent properties. His only protection was the right to drill offsets. *He could obtain no injunction. Prairie Oil and Gas Co.* v. *State, supra.* See also *Hunt* v. *State,* 48 S. W. 2d 466, where the Court stated: "No cause of action lies in the owner of the surface against his neighbor for draining the oil and gas from under his land."

Such were Respondents' substantive rights in the absence of police regulation. They could not complain of their neighbors. They were relegated to their remedy of self-help. Under Constitutional direction (Article 16, Sec. 59a) the Legislature enacted laws affecting those substantive rights. The Legislature vested the Texas Railroad Commission with authority to carry out the policy of conserving oil and gas in Texas (Title 102, Revised Civil Statutes of Texas, 1925; for amendments see Title 102, Vernon's Annotated Civil Statutes) by authorizing it to promulgate rules and regulations for the protection of oil and gas. Acting pursuant to that authority the Commission promulgated its spacing rule, Rule 37. The spacing rule supplanted Respondents' right of self-help. The spacing

rule became Respondents' substantive right. But that substantive right of Respondents is not involved in this litigation; for that substantive right,

> " • • • guarantees the opportunity in each owner to recover his oil by providing an exception to a uniform spacing regulation that would otherwise prevent him from doing so." *Brown v. Humble Oil and Refining Co.*, 126 Tex. 296.

Whereas Respondents' previous substantive right was to counteract drainage by offsets, their new substantive right is to apply to the Railroad Commission to drill one or more wells on their own land as exceptions to the spacing rule to "prevent confiscation of property." If, on the other hand, they take advantage of the remedial provisions of Sections 8, 10 and 11 of Article 6049c of the Texas statutes to attempt to nullify an order of the Railroad Commission granting a drilling permit to another operator, they are not enforcing *their* substantive rights (to an exception) but "testing the validity" of their neighbors' right.

The Respondents in these cases are not asserting rights which have been denied to them by the Railroad Commission after proper application for relief. They are merely complaining of the action of the Railroad Commission in acting favorably upon the applications of Burford and Hastings and Dodson to drill wells on their own land. The orders here under attack affect the Respondents at most only indirectly; they do not restrict or limit Respondents' freedom of action in any way. They plainly do not deny to the

Respondents a fair chance to recover the oil and gas in or under their land, or their equivalent in kind, which is the measure of the Respondents' rights as settled by the decisions of the Supreme Court of Texas. *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. 2d 73, 80. In fact, the undisputed evidence in the Burford case shows that Respondents even at the time of the hearing before the Railroad Commission had already recovered 100% of the recoverable reserves originally under their land (R. 286) and this oil had been replaced by other oil drained from other leases. (R. 286, 342). Substantially the same situation exists in the Hastings case.

It is submitted that the procedural portion of the statute is not enforceable in the federal courts for the reasons previously stated; and Respondents substantive rights are not capable of enforcement in a federal court by reason of its diversity jurisdiction until the administrative body has unlawfully denied them their right to drill.

I. (b)

Assuming that the Court proceeding provided by Texas Law involves a "Case or Controversy," does it also involve the determination of State Government policy committed by State statutes to the State Administrative process?

We are frank to state that in our opinion the review contemplated by Article 6049c, Sections 8, 10 and 11 of the orders of the Railroad Commission is

not legislative or administrative in character within the meaning of *Prentis* v. *R. R.*, 211 U. S. 210 and related cases. In our view such is not the effect of the most recent expressions of the Texas Supreme Court.

Railroad Commission v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. 2d 1022, *Railroad Commission* v. *Wencker*, (Tex.) 168 S. W. (2d) 625, 629.

In so interpreting the opinions of the Supreme Court we might possibly be in error. But of this we are quite certain: If the learned judges of the Fifth Circuit Court of Appeals are correct in their interpretation of the opinion of the Texas Supreme Court *that a litigation is entitled to have the independent judgment of the trial court on the question of reasonableness or necessity* (Judge Hutcheson in 128 Fed. 2d 334 at 337; Judge Holmes in 130 Fed. 2d 10 at 13, 16, 19; Judge McCord in 130 Fed. 2d at page 18) then the proceeding authorized by Sections 8, 10 and 11 of Article 6049c of the Texas statutes is administrative or legislative in character within the precise holdings of this Court in the *Prentis* case, supra; *Bacon* v. *Rutland Ry. Co.*, 232 U. S. 134; *Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464; and *Porter* v. *Investors Syndicate*, 286 U. S. 461; *Keller* v. *Potomac Electric Co.*, 261 U. S. 428.

No reference can be found in the opinion of Chief Justice Alexander of the Texas Supreme Court in the *Shell* case, supra, to the exercise by the trial court of an "independent judgment." The question involved

in *Railroad Commission* v. *Shell*, supra, was whether upon the trial contemplated by Section 8 of Article 6049c of the Texas statutes the evidence should be confined to the record made before the administrative agency or whether there should be an "*independent hearing*" of the evidence anew. His holding was simply that there should be a "*hearing of the evidence anew in the trial court.*" The exercise of an "independent judgment" and the building of an "independent hearing" are matters of vastly different consequence.

An illustration of the principles enunciated above can be drawn from the instant cases. In the Burford case the trial court heard testimony to the effect that Burford's tract was a subdivision made from a larger tract in derogation of the commission's applicable spacing rule and that said tract with the wells allowed by the permits in suit would be more densely drilled than surrounding tracts. (Plaintiff's theory)

The court further heard testimony to the effect that the subdivision made in the Burford case was in "substantial compliance" with the commission's spacing rules as that term is defined by Texas decisions and that the owners of the tract had been prevented for a long time from recovering any of the oil under their land while their neighbors had recovered large amounts in the past. (Defendant's theory).

In the Hastings case the district court heard testimony to the effect that Hastings tract was drilled

more densely than plaintiffs' tract and other leases surrounding it. (Plaintiffs' theory) The district court further heard testimony to the effect that defendants' tract was at a 37½% density disadvantage as compared with an area eight times its size surrounding it, same being a method of comparison frequently used by the commission on the issue of drainage. (Defendants' theory)

It is obvious that in each of the above cases the Railroad Commission adopted the defendants' views and rejected plaintiffs' views as evidenced by this litigation attacking the commission's orders.

It is our view that if the district court in the instant cases had entered judgment cancelling the commission's permit orders involved because in his view plaintiffs' theories and suggested yardsticks of comparison were wiser and constituted better bases of comparison than those used by the commission that such determination and judgment by the district judge would constitute an independent determination of the cases clearly administrative in character.

Apparently the Circuit Court of Appeals decided that such independent judicial determination was required under Texas law when it remanded these cases for a new trial. If this view is correct the Circuit Court of Appeals should have instructed the district court to decline jurisdiction until the administrative process was completed.

I. (c)

Does Article 6049c Confine Jurisdiction to a State Court in Travis County, Texas?

We do not feel that we can give a categorical answer to this question. In other words, we do not think that the statutory language restricting the review to "a court of competent jurisdiction in Travis County, Texas, and not elsewhere," was intended to limit or restrict the jurisdiction of the federal courts. We do think, however, that the statute was intended only to create a new statutory procedural remedy exclusively for the state courts and that it was not intended thereby to extend the jurisdiction of the federal courts. For the reasons hereinabove stated, we think that it would have been beyond the competence of the state legislature to create a new procedural remedy in the federal courts and that the remedy created is not a "case or controversy."

While we deem that under the principles set forth, it matters little whether or not the Texas Legislature intended to include a federal district court when it used the phrase, "a court of competent jurisdiction in Travis County, Texas, and not elsewhere," we should like to express our views in response to this question.

Section 8 of Article 6049c of the Texas statutes provides that an interested person, dissatisfied with an order of the Commission may file suit *in a court of competent jurisdiction in Travis County, Texas,*

and not elsewhere, to test the validity of an order of the Commission. Section 11 specifies that either party to the suit may appeal from the trial court's judgment; that such appeal "shall at once be returnable to the appellate court" and have precedence over all other cases. Section 11 further provides that, "*In the Court of Civil Appeals*" the court shall immediately decide the questions involved and that in the event any question or questions shall be certified to the *Supreme Court* or writ of error thereto be requested or granted, it is made the duty of the Supreme Court immediately to set down said cause for hearing. The last paragraph of the section vests the courts of civil appeals and their judges with jurisdiction to issue such writs of prohibition, mandamus and injunction as may be necessary to prevent the enforcement of an order of the trial court granting injunctive relief without notice and hearing.

Clearly, it would appear that while the Texas Legislature sought neither to include or exclude a federal court, it had reference to a Travis County District Court, to a Texas Court of Civil Appeals, and to the Texas Supreme Court. No Texas court has held otherwise. In *Alpha Petroleum Company v. Terrell* (Comm. App. 1933) 122 Tex. 257, 59 S. W. 2d 364, the Texas Commission of Appeals in an opinion adopted by the Texas Supreme Court held that under the appeal statute as originally enacted, the suit,

> "* * * *must be brought in a district court of Travis County, Texas, and that this requirement is one of jurisdiction, and not a mere question of venue.*" (Emphasis Supplied)

To the same effect is *Ex parte Lee*, 127 Tex. 256; 93 S. W. 2d 720; and in *Altgelt* v. *Texas Company*, (Civ. App.) 101 S. W. 2d 1104, writ dismissed by Texas Supreme Court, we find the court saying:

> *"It is likewise now settled that the district court of Travis County has exclusive jurisdiction to determine the validity of the Railroad Commission's order in such cases."*

It is true that in *Reagan* v. *Farmers Loan and Trust Company*, 154 U. S. 362, 38 L. Ed. 1014, in interpreting the phrase in the section of the statute providing for review of railroad rates that suit be "in a court of competent jurisdiction in Travis County, Texas," this Court held that the Federal Circuit Court for the Western District of Texas was a "court of competent jurisdiction in Travis County."

It is likewise true that in *MacMillan* v. *Railroad Commission of Texas*, 51 Fed. 2d 400, a stautory three-judge district court, citing the *Reagan* case for authority, held that under another Texas review statute, now repealed, plaintiff could maintain suit in a Federal District Court for relief against the proration orders involved *"if they are, as to plaintiff, unreasonable and unjust."*

In the *Reagan* case the question was whether or not a suit against the members of the Railroad Commission and the Attorney General to restrain the enforcement of a rate order was in effect a suit against the state inhibited by the 11th Amendment to the United States Constitution. After holding that it

was not such a suit Mr. Justice Brewer proceeded to state that in any event the Legislature had authorized suit by parties complaining of orders of the Commission.

The *MacMillan* case followed this dictum. It provides little assistance. The proration order there involved was a legislative order operating directly upon the plaintiff and requiring that he cut his production from a potential of 50,000 bbls. daily to 1,455 bbls. daily. Plaintiff alleged and the Court held he proved that the Commission had no statutory authority to enter the order.

In addition, the statute involved in neither case was the same as the statute involved in this case. Neither statute, like Article 6049c, provided for expeditious appeals from the "court of competent jurisdiction in Travis County, and not elsewhere" to the Court of Civil Appeals, and therefrom to the Supreme Court. See Section 11, Article 6049c.

We pass to a more impelling consideration. Rule 1 of the Rules of Civil Procedure for the District Courts of the United States adopted by this Court pursuant to the Act of June 19, 1934, Ch. 651, provides that the rules "govern procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. Rule 81 contains no exception for special statutory proceedings such as that provided by the Texas statute, and the Conformity Act has been superseded. 1 7 Hughes Federal Practice § 18501.

The difficulties involved in reconciling the Rules with the special procedure provided in Article 6049c are manifest:

Advancement in trial court. Section 8 of Article 6049c provides that the suit shall be advanced for trial and determined as expeditiously as possible. No postponement is to be granted save for reasons deemed imperative to the court. Rule 40 provides:

> "The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States."

Injunctions. Section 10 of Article 6049c provides that no temporary restraining order, temporary or permanent injunction, or any character of injunctive relief may be granted against the Commission without five days notice and a hearing; further that a verified petition shall not be sufficient to overcome the presumptive validity of the order complained of or to empower the court to grant any character of injunctive relief. Rule 65 (b) provides in part:

> "No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage

> will result to the applicant before notice can be served and a hearing had thereon. * * * "

Supersedeas. After adverse judgment in a state court the Commission may supersede the judgment without giving bond. *Allen* v. *Gulf Oil Corporation*, (Civ. App.) 139 S. W. 2d 207, writ of error refused by Texas Supreme Court; Article 2276, Vernon's Annotated Civil Statutes[6]. Rule 73 provides, in part:

> "Whenever an appellant entitled thereto desires a stay or appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. * * * "

Finally, in the Courts of Civil Appeals and in the Texas Supreme Court causes under Article 6049c have precedence over all other causes, proceedings and causes of a different character.

It is submitted that the State of Texas may lawfully provide a special procedural statute in oil and gas conservation cases and that in so providing, its right to speedy advancement, precedence in trial, injunction only after notice and hearing and right to supersede cannot be impaired by the Federal Courts.

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[6] "Neither the State of Texas, nor any county in the State of Texas, nor the Railroad Commission of Texas, nor the head of any department of the State of Texas, prosecuting or defending in any action in their official capacity, shall be required to give bond on any appeal or writ of error taken by it, or either of them, in any civil case."

II

Are there grounds similar to those existing in Railroad Commission v. Pullman Co., 312 U. S. 496, which make it appropriate for the district court in its discretion to withhold the exercise of its equity jurisdiction?

We understand the reasons for this Court's decision in the *Pullman* case to be that the state statute involved in that case had not been construed by the state courts, whose decision would necessarily be authoritative, and that, since a speedy remedy was available in the state courts, the federal courts would withhold at least temporarily the exercise of their equity jurisdiction. If our understanding is correct, the primary basis for the decision in the *Pullman* case is not present in these cases, because the state statute here involved has been construed many times by the state courts. There are other reasons, which we have attempted to set forth herein, why the parties should be relegated to the state courts for the determination of the issues of state law, but we do not think that it can be correctly said that these reasons are the same as in the *Pullman* case.

III

In view of the recent decisions of the Texas courts, are there grounds similar to those existing in Railroad Commission v. Rowan & Nichols Oil Co., 311 U. S. 614, 615, which make it appropriate for the district court to decline jurisdiction of the cause?

We think that similar grounds exist for the district court to decline jurisdiction, as in the *Rowan & Nichols* case, of the determination of the validity of the Railroad Commission order under the state law, for the reasons stated below:

The portion of the Rowan & Nichols opinion referred to in the Court's question is as follows: (311 U. S. 614, 615)

> "While the presence of a federal question may also open up state issues, Siler v. Louisville & N. R. R., 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753, the claim here founded on Texas law is derived from a statute requiring proration on a 'reasonable basis.' Vernon's Texas Annotated Civil Statutes, Art. 6049c, Sec. 7. The Texas decisions, insofar as they have been brought to our attention, do not make clear whether the local courts may exercise an independent judgment on what is 'reasonable.' Compare Brown v. Humble Oil & Refining Co., 126 Tex. 296, 316, 83 S. W. 2d 935, 87 S. W. 2d 1069, 99 A.L.R. 1107, 101 A.L.R. 1393. But, in any event, as we read the Texas cases, the standard of 'reasonable basis' under the statute opens up the same range of inquiry as the respondent in effect asserted to exist in his claims under the Due Process Clause. These latter claims we have found untenable. What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by the denial, on the grounds

we have indicated, of the extraordinary relief of an injunction in the federal courts."

We assume that in its question No. 3, stated above, this court in speaking of declining "jurisdiction of the cause" intended to refer only to jurisdiction insofar as the determination of the validity of the order under the state law is concerned, since this Court in the *Rowan & Nichols* case did not decline to pass on the constitutional issues presented.

This Court states in the *Rowan & Nichols* case, supra, that the Texas decisions do not make clear "whether the local courts may exercise an independent judgment on what is 'reasonable.'" The first question, therefore, is whether the recent Texas decisions have clarified this question. This can be determined by a comparison of the language in the opinion in *Brown* v. *Humble Oil & Refining Co.*, with the language in the recent decisions of the court. In the *Brown* case, the Supreme Court of Texas, at the place referred to in this Court's opinion, said: (126 Tex. at p. 316)

> "We recognize that the Railroad Commission is authorized to make rules relating to the production of oil and gas. *This Court will not undertake to prescribe any rule or standard to guide the Commission, except that its actions must be legal, reasonable, and not arbitrary.* There are many factors, facts, and circumstances, which we shall not undertake to detail here, in each case and in each hearing, which must be considered, weighed, and given effect,

in the fair and reasonable administration of such laws, rules, and exceptions. All questions of fact are primarily for the Commission to determine.

"We held in the original opinion, and reiterate it here, that the Legislature enacted certain laws which declare the public policy of the State with respect to the development and conservation of oil and gas, and placed the duty upon the Railroad Commission to carry out the details. The duty is lodged with the Railroad Commission to make rules to carry out the mandates of the Legislature, and to impartially enforce them. In the exercise of its power to grant exceptions to its rules, it is the duty of the Commission to treat all interested parties justly, fairly, and impartially under all the facts and circumstances of the case; and *the actions and rulings of the Commission in attempting to accomplish such results will not be disturbed by the courts, unless they are clearly illegal, unreasonable, or arbitrary.* All rules and rulings of the Railroad Commission are presumed to be valid until the contrary is made to appear. If a rule of the Commission is found to be illegal or invalid by a court of competent jurisdiction, such court may so adjudge. *The court cannot substitute a new rule for the one adjudged invalid.* That power rests exclusively with the Railroad Commission." (Our emphasis.)

The Circuit Court of Appeals purports to find in the decision of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1022, a clarification of the Texas law to the effect that the state courts may exercise an independent judgment as to what is "reasonable."

(Judge Hutcheson, 128 F. (2d) at p. 337; Judge Holmes, 130 F. (2d) at pp. 16, 19). We submit that there is nothing in Chief Justice Alexander's opinion to justify this conclusion. The phrase "independent judgment" does not occur in his opinion. It is true that he says, relying on earlier decisions, that there must be an "independent hearing" of the evidence by the court, because the Texas statutes provide no method for the making of a record before the Railroad Commission and an appeal on that record. (139 Tex. at p. 76; 161 S. W. (2d) at p. 1028). But Chief Justice Alexander does not say that the court will substitute its ideas of reasonableness for those of the Railroad Commission. On the contrary his words are as follows: (139 Tex. at p. 78; 161 S. W. (2d) at p. 1029)

> "If the matter covered by the order is one committed to the agency by the Legislature, and involves the exercise of its sound judgment and discretion in the administration of the matter so committed to it, the court will not undertake to put itself in the position of the agency, and determine the wisdom or advisability of the particular ruling or order in question, but will sustain the action of the agency so long as its conclusions are reasonably supported by substantial evidence. This is so because, since the Legislature has seen fit to vest authority to exercise sound judgment and discretion in the particular matter in the administrative agency, courts will not undertake to usurp the powers committed to the agency, and to exercise the agency's judgment and discretion for it."

We submit that there is no difference in the law as

stated by Chief Justice Alexander in the *Shell* case from the law as previously stated in the *Brown* case. Our conclusion is fortified by the language used by the Supreme Court of Texas in the case of *Railroad Commission* v. *Wencker*, 168 S. W. (2d) 1625, (decided since the first argument in these cases), in which the Texas court said: (168 S. W. (2d) at p. 629)

> "The statutes authorize the Railroad Commission to handle the details relating to the production of oil and gas in the State. Article 6004 et seq., Vernon's Annotated Civil Statutes. The Railroad Commission has exclusive original jurisdiction to determine the matter of changed conditions in granting permits to drill wells, subject to the right of appeal to the courts. Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S. W. (2d) 1106; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. (2d) 73; Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S. W. (2d) 935, 99 A. L. R. 1107. The Railroad Commission is given the power to determine primarily all fact issues, that is, all issues that are not established as a matter of law; and to permit the courts to pass upon a question not passed on by the Commission would violate such power. Gulf Land Co. v. Atlantic Refining Co., supra; Brown v. Humble Oil & Refining Co., supra."

In view of the foregoing language in the more recent opinions of the Supreme Court, we think it is impossible to say that the Texas law is any different from what it was at the time the *Rowan & Nichols* cases were decided. Certainly the Supreme Court

of Texas in the *Shell* case did not purport to change the law but merely stated that it was following the rules laid down in previous decisions. We, therefore, submit that it may be said with equal support in the Texas decisions now as at the time of the *Rowan & Nichols* cases were decided (1) that the Texas decisions do not make clear whether the local courts may exercise an independent judgment on what is reasonable, but (2) apparently, according to the Texas cases, the standard of reasonableness under the Texas law is substantially the same as the standard of reasonableness used by this Court in testing the validity of an administrative order under the Due Process Clause (with the exception, which we have already pointed out, that under the special Texas statutory appeal, the complaining party does not have to show actual injury to his property interests). There having been no change in the Texas law, there is no reason why this Court should now reach a different conclusion from the conclusion reached in the *Rowan & Nichols* cases.

If, however, we are mistaken as to the proper interpretation to be placed on the more recent decisions of the Supreme Court of Texas, and if the Texas Courts must in fact exercise an "independent judgment" as to what is reasonable, then we submit that clearly the federal district courts should decline jurisdiction to pass on the validity of the orders under the state law because the proceedings would then be clearly administrative and not judicial in character. By the exercise of an independent judgment as to what is reasonable the Circuit Court of Appeals

must have meant that the court could substitute its discretion for that of the Railroad Commission and, if it found another order to be more reasonable, it could then nullify the Railroad Commission's decision. This would clearly be doing, under the guise of enforcing a state statute, what is not done when the Due Process Clause is invoked. This is exactly what this court held should not be done in the *Rowan & Nichols* cases.

As we have already pointed out[7], each of these cases involves questions of policy which involve the choice as to whether one method or another is a more reasonable basis for determining whether a permit to drill a well should be issued. For example, in the *Hastings* case the Commission had to decide whether the basis for comparison of density of drilling should be the lease as compared with a surrounding area equal to eight times the area of the lease, or as compared with the entire area of all of the surrounding leases. The Commission chose the former method; the respondents say the latter method is more reasonable. Should the district court, exercising its "independent judgment," strike down the order because the respondents' method is more reasonable? We submit that the answer should be "no" for the same reasons that the court declined to exercise jurisdiction to pass on the validity of the order under the state law in the *Rowan & Nichols* cases.

Similar questions of policy are involved in the *Burford* case. Is the application for a permit on the

[7]Page 15, supra.

Burford strip a substantial compliance with the spacing rule? The respondents say it is not, because of the narrowness of the strip; the Railroad Commission in granting the permit impliedly found that it was a substantial compliance, because of the area of the strip. Should the court set aside the Railroad Commission's order if it finds that the respondents' contention is more reasonable? We submit that such exercise of an "independent judgment" would be beyond the proper exercise of the judicial function and clearly in conflict with the *Rowan & Nichols* decisions.

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APPENDIX

Texas Statutes relating to the power of the Railroad Commission to promulgate and enforce well-spacing orders and appeals to the courts from such orders. All Statutes here copied are to be found in Vernon's Annotated Texas Civil Statutes.

"Article 6014. 'Waste'

"The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

" . . .

"(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

"(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be utilized under one management, control or ownership."

"Article 6029. 'Rules and Regulations'

"The Commission shall make and enforce rules, regulations or orders for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, including rules, regulations or orders for the following purposes:

"(1) To prevent the waste, as hereinbefore defined, of crude petroleum oil and natural gas in drilling and producing operations and in the storage, piping and distribution thereof.

" . . .

"(3) For the drilling of wells and preserving a record thereof.

"(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

" . . .

"(8) It shall do all things necessary for the conservation of crude petroleum oil and natural gas and to prevent the waste thereof, and shall make and enforce such rules, regulations or orders as may be necessary to that end.

"(9) To provide for the issuance of permits, tenders, and other evidences of permission when the issuance of such permits, tenders, or permission is necessary or incident to the enforcement of its rules, regulations, or orders for the prevention of waste."

"Article 6036a. 'Notice of Hearing'

"No rule, regulation or order shall be adopted by the Commission under the provisions of this Act or of Title 102 of the Revised Civil Statutes of Texas, 1925, as amended, dealing with the conservation of oil and gas and the prevention of the waste thereof, except after hearing upon at least ten (10) days notice given in the manner and form prescribed by the Commission; provided that in case of an emergency is found by the Commission to exist which, in its judgment requires the making of a rule, regulation or order without notice and hearing, such emergency rule, regulation or order may be promulgated and shall have the same validity as if a hearing with respect to the same had been held after due notice. The emergency rule, regulation or order authorized herein shall remain in force no longer than fifteen (15) days from its effective date and, in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation or order becomes effective.

"The Commission may, without prior notice, revoke any rule, regulation or order, promulgated by it; and it may, without prior notice, amend the same, provided the subject matter of the amendment was considered at the hearing made the basis for such rule, regulation or order. The renewal or extension of any rule, regulation or order shall be based upon a hearing after proper notice, subject to the provisions of this Section with reference to emergency rules, regulations and orders."

"Article 6046. 'Rules for prevention of waste'

"The Commission, when necessary, shall make and enforce rules and regulations either general in their nature or applicable to particular oil fields for the prevention of actual waste of oil or operations in the field dangerous to life or property.

"Article 6049c. 'Oil and gas conservation, powers and duties of Railroad Commission'

"Section 8.

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations, or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

"Section 10.

"No injunction, whether temporary restrain-

ing order, temporary injunction, permanent injunction, or other character of injunctive relief, shall be granted against the Railroad Commission, its members, agents, and representatives, to restrain it or them from enforcing any rule, regulation, or order made and promulgated by the Railroad Commission under the conservation statutes of this State, relating to oil and gas, or any amendments thereof, or restrain the enforcement of any such statute, except after notice to the Commission and a hearing as hereinafter provided; provided that when a petition or application is filed asking for any such character of temporary injunctive relief, the clerk of the court in which such petition or application is filed shall issue notice to the Commission in writing, which notice shall contain the docket number, style, and a brief statement of the nature of such suit, and such notice shall be served on the Commission by delivering a copy of such citation to the Commission or any member thereof, or to the Secretary thereof, in Travis County, for the service of other citations, and five (5) days from and after the service of such notice a hearing may be had on such application; provided further that the rule, regulation, or order complained of shall be taken as prima facie valid and the use and introduction of the verified petition of plaintiff shall not be sufficient to overcome the prima facie validity of the rule, regulation, or order complained of, or to empower the court to grant any injunctive relief against the enforcement of said rule, regulation, or order; provided further, that before any order granting any character of injunctive relief against any such statute or against any such rule, regulation, or order of the Commission shall become effective the plaintiff shall be re-

quired by the court to execute a bond with good and sufficient sureties in an amount to be fixed by the court reasonably sufficient to idemnify all persons when the court may find from the facts proven will suffer damages by reason of the violation of the statute, rule, regulation, or order complained of, such persons to be named in the order of the judge when the amount of the bond is fixed by the court and entered of record; provided further, that the finding of the court that any party is likely to suffer damages shall not be admissible as evidence of damages in any suit on such bond. . . . "

"Section 11.

"After notice and hearing is had upon application for any such injunctive relief either party to said suit has the right of appeal from any judgment or order therein granting or refusing any injunction, whether temporary restraining order, temporary injunction, permanent injunction, or other character of injunctive relief, or from any order granting or overruling a motion to dissolve any such injunction. Said appeal shall at once be returnable to the appellate court and said action so appealed shall have precedence in said appellate court over all cases, proceedings, and causes of a different character therein pending. The provisions and requirements of Article 4662, Revised Civil Statutes of 1925, relating to temporary injunctions shall likewise apply to appeals from any order granting or refusing a temporary restraining order, or granting or overruling a motion to dissolve such temporary restraining order, under the provisions of this Act. In the Court of Civil Appeals such court shall immediately and at as

early a date as possible decide the questions involved therein; and in the event any question or questions shall be certified to the Supreme Court, or writ of error thereto be requested or granted, it is here made the duty of the Supreme Court immediately to set down said cause for hearing and decide the cause at as early a date as possible, and such cause shall have precedence over all other causes, proceedings and causes of a different character in such court. . . . "

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,
Petitioners,

vs.

SUN OIL COMPANY, ET AL.

No. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

vs.

G. E. BURFORD, ET AL.

BRIEF FOR SUN OIL COMPANY AND MAGNOLIA PETROLEUM COMPANY

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CAPITAL PRINTING COMPANY, INC.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,
Petitioners,

vs.

SUN OIL COMPANY, ET AL.

No. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

vs.

G. E. BURFORD, ET AL.

BRIEF FOR SUN OIL COMPANY AND MAGNOLIA PETROLEUM COMPANY

Because this brief applies to both branches of this case, G. E. Burford, X YZ Oil & Gas Company and the Railroad Commission are herein referred to as "petitioners" and Sun Oil Company and Magnolia Petroleum Company are referred to as "cross-petitioners."

OPINIONS BELOW

The opinions of the Circuit Court of Appeals are reported in 124 F. (2d) 467, 130 F. (2d) 10, and 130 F. (2d) 18.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code as amended by act of February 13, 1925. 43 Stat. 938, 28 U.S.C.A. Sec. 347. The judgment to be reviewed was entered on July 11, 1942 (R. 440), and cross-petitioners' petition for rehearing was overruled on August 13, 1942. (R. 478) The cross-petition for writ of certiorari was filed in this court on October 27, 1942, and was granted on January 18, 1943.

Cross-petitioners urge, notwithstanding the remand by the Circuit Court of Appeals, that this court has jurisdiction to render final decree for cross-petitioners if the record is such that a final decree would be proper. **Harriman v. Northern Securities Co.**, 197 U. S. 244, 25 S. Ct. 493; **Spiller v. Atchison, T. & S. F. R. Co.**, 253 U. S. 117, 40 S. Ct. 466; **Wichita Roy. Co. v. City Natl. Bank of Wichita Falls**, 306 U. S. 103, 59 S. Ct. 420.

STATEMENT OF THE CASE

Sun Oil Company, as plaintiff, filed this suit in the United States District Court, Western District of Texas, Austin Division, against G. E. Burford. X Y Z Oil & Gas Company, the Railroad Commission of Texas and its members, as defendants. (R. 1) Magnolia

Petroleum Company intervened with a similar complaint against the defendants. (R. 34) Both complaints seek cancellation of orders of the Railroad Commission granting drilling permit for well locations described as Burford Nos. 1, 2, 3, and 4 on 2.33 acres, which in turn is a part of the W. L. Fuller 102.33 acre tract, Gregg County, Texas, East Texas Field; injunction against drilling and operation of the wells; and alternatively, for injunction against operation of the well locations until the Railroad Commission shall so adjust the total daily production from the 2.33 acres that it will be no greater, in proportion to comparative reserves, than the total daily allowable fixed by the Commission for wells on the remainder of the Fuller tract. (R. 29, 40).

X Y Z Oil & Gas Company is an assignee of Burford. (R. 28, 212).

Jurisdiction was asserted on grounds of diversity of citizenship and federal questions (R. 2) and found to exist on both grounds (R. 88-9, 90). Such a suit is expressly authorized by state statute. Acts 1935, 44th Leg., p. 180, ch. 76, sec. 14, Ver. Tex. Stats. 1936, Art. 6049c, sec. 8.[1]

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[1]This statute reads as follows:

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of such laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

The orders in controversy were granted as exceptions to the Commission's well spacing rule for the East Texas Field, which rule was adopted pursuant to powers granted by the Texas oil and gas conservation statutes[2] on findings that such general rule is necessary to prevent waste of oil and gas. (R. 111-134) This rule provides that no wells shall be drilled at lesser distances than 660 feet from other wells and 330 feet from property lines (i.e., ten acre spacing), but that exceptions may be granted when necessary to prevent waste or to prevent the confiscation of property. (R. 132-3)

The involved permit orders were granted solely under the "confiscation of property" exception clause. (R. 30, 32, 153, 155). The four locations are approximately 24 feet from the sides of the Burford 2.33 acre strip.[3] (R. 104)

Cross-petitioners attacked the permit orders on the grounds indicated below in the statement of contentions. (R. 20-1, 12-14, 22-3, 17-18, 19, 24-5)

The judgment of the district court found the issues of law and fact with the defendants, and dismissed the complaints. (R. 87-8) The Circuit Court of Appeals reversed and remanded the case for new trial (R. 439, 440) without adjudicating the merits, but cross-petitioners contend the record is such that final judgment

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[2]Acts 1919, p. 285; Acts 1931, 42nd Leg., 1st C.S., p. 46, ch. 26, secs. 1, 15; Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2, secs. 1, 7; Acts 1935, 44th Leg., p. 180, ch. 76, secs. 2, 4; Ver. Tex. Stats., 1936, Arts. 6014, 6029.

[3]The Burford strip is referred to in exhibits as 2.21 acres, 2.4 acres, 2.81 acres, and 2.33 acres (R. 104, 138, 141, 168, 190)—a difference in surveying which is immaterial to the questions presented. Petitioners call it 2.33 acres and we shall so describe it.

for cross-petitioners should be entered on the undisputed evidence.

The 2.33 acres was created by voluntary subdivision of the leasehold estate in the Fuller 102.33 acres, the owner of the lease on the entire tract having assigned first, the east 50 acres now owned by Magnolia, and second, the west 50 acres to Sun Oil Company in February, 1931; thus leaving between the assigned portions the strip 49 feet wide. (Area A-B-C-D on Exhibit 1, R. 104; R. 108, 109-110, 3-4) The Commission's original spacing rule, requiring wells to be not less than 150 feet from property lines nor less than 300 feet from other well locations, was in effect when this subdivision was made. (R. 111) By subsequent amendments the spacing requirements were increased to a minimum of 330 feet from property lines and 660 feet from other wells. (R. 112-134) The Railroad Commission's general order of May 29, 1934, provides that in applying the spacing rule no subdivision of property made subsequent to adoption of the original rule shall be considered in determining whether any property is being confiscated within the terms of the rule. (Allegations of Complaint, R. 8-9, undenied by answers, R. 41, 45, 49) Cross-petitioners contend that under the settled law of Texas the Railroad Commission had no power to grant a permit on the strip under the "confiscation of property" exception clause.

On October 11, 1934, before the strip was assigned to Burford and X Y Z Company, the Commission granted Mamie Hammonds permit to drill on this same strip (R. 163) on **both** grounds of exception to the spacing rule (R. 190-1); and in Cause No. 54769 (consolidated with No. 54743), District Court of Travis County, Texas, cross-petitioners obtained a final judg-

ment (R. 185) against the Railroad Commission, Hammonds and others (predecessors of Burford and X Y Z Company—R. 212), canceling the permit order on allegations that it was granted in violation of the spacing rule and that the strip was not entitled to development as a separate tract. (R. 164, 174-6) The land from which the strip was last subdivided is as well protected from drainage and is recovering the oil through existing wells as efficiently as it was when the prior permit was granted. (R. 375-6, 395-6) Cross-petitioners contend that under the settled law of Texas the judgment in such prior suit is **res adjudicata** that the Railroad Commission was without power to regrant a permit on the strip under the "confiscation of property" exception clause.

The statement on page 6 of Petitioners' Brief, that substantial changes in conditions have occurred, is inaccurate for reasons hereinafter shown.

Cause No. 53915, styled Sun Oil Company v. Railroad Commission and Mamie Hammonds, in which Magnolia intervened, was pending in the District Court of Travis County for final trial at the time Burford's application was filed, heard and granted by the Railroad Commission. (R. 205-6, 208) Said suit was for the purpose of canceling still another order granting Mamie Hammonds permit to drill on this same strip, and it was an issue in said suit that the strip, being a subdivision, was not entitled to be developed as a separate tract under the spacing rule. (R. 192, 197-8, 203) Contrary to the statement on page 6 of Petitioners' Brief that this prior permit had been abandoned, which statement has no support in the record other than a mere contention by counsel, the proof shows that such prior case came on for trial and was

tried by the District Court of Travis County, Texas, after the Burford permit was granted, and final judgment was rendered canceling the Hammonds permit order there involved. (R. 208) Cross-petitioners contend that under the settled law of Texas the pendency of such suit to cancel the prior permit order deprived the Railroad Commission of jurisdiction to grant **pendente lite** another permit on the same tract.

It was shown that Burford did not contend he needed four wells to enable him to recover the equivalent of the oil in place under the strip (R. 233-293, 294-317, 318-365), but that one well on the strip would produce more oil than there is under it. (R. 362-3) The Commission's proration order allowed each well in the area to produce up to a flat 20 barrels per well daily, irrespective of the size of the tract or reserves in place. (R. 370) Sun's 50 acre lease had seven wells and Magnolia's 50 acre lease had six wells. (R. 18, 104, 141) The allowable of four wells on the strip would be approximately 4/7ths as great as the total allowable of Sun's 50 acres and approximately 2/3rds as great as the total allowable of Magnolia's 50 acres; and this will result in drainage from the adjacent tracts. (R. 349-350; 368-9) With four wells on the strip, Sun will lose between 70,000 and 100,000 barrels of oil which its wells would otherwise produce (R. 369), and Magnolia's loss of oil to the Burford locations will be about 50% as much as Sun's loss. (R. 377) The four locations on the strip are each approximately 24 feet from cross-petitioners' leases, whereas cross-petitioners' nearest wells are roughly 330 feet from the strip (R. 104), and allowance of the Burford locations will make it necessary for Sun and Magnolia to drill additional wells "just to meet the

offsets" (R. 368-9), and such a concentration of wells would lower the pressure, reduce the flowing life, and increase the operating expenses. (R. 371, 376-7) Cross-petitioners tendered an offer to pool their leases with the strip for development as an entire tract in either of three ways: (a) the strip and the Sun lease; (b) the strip and the Magnolia lease; and (c) one half of the strip with the Sun lease and one half with the Magnolia; and under either method offered to share ratably the future production from the pooled property in proportion to the acreage so contributed by each owner, less deduction in the same proportion for future drilling and operating expenses. (R. 158, 19)

For both reasons given in the preceding paragraph, the statement on page 5 of Petitioners' Brief, that without the wells granted Burford would have no opportunity to recover the oil under his tract or its equivalent, is inaccurate.

Cross-petitioners urged in the alternative, both before the Railroad Commission and in court, that if the strip is to be allowed four wells, the allowable thereof should be so adjusted as to be in proportion to the allowable on the remainder of the Fuller tract, and by alternative prayer in this suit seeks injunction against operation of said wells until such adjustment is made. (R. 159-160, 29) Such an adjustment would give the Burford strip its share of the oil and would lessen the drainage from cross-petitioners' leases. (R. 370-1)

Cross-petitioners contend that since one well would produce more oil than is under the strip, under the settled law of Texas the Railroad Commission was without power to grant the strip additional wells under the "confiscation of property" exception clause;

that to grant it more than one, and at the same time deny the requested adjustment of allowable, all in the face of cross-petitioners' offer to pool, exceeds the necessities of the case and was so arbitrary, discriminatory, and confiscatory as to violate cross-petitioners' rights under the Fourteenth Amendment to the Constitution of the United States, as well as their rights under the laws of Texas.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In failing to render judgment annulling the permit orders and granting injunctive relief ancillary thereto as prayed by cross-petitioners, on the undisputed evidence that the 2.33 acres was voluntarily subdivided from the west 50 acres in such way that it does not comply with the spacing rule, and that, disregarding the subdivision, the west 52.33 acres did not need additional wells to protect it from drainage, the law of the State being that under such circumstances the Commission has no power to grant permits on the strip "to prevent confiscation of property," the sole ground on which these permit orders were granted.

(2) In failing to render judgment annulling the permit orders and enjoining drilling and operation of the locations involved, because as a matter of State law, under the undisputed evidence, the judgment in Cause No. 54769 (consolidated with No. 54743) is **res adjudicata** against Burford's and X Y Z Company's claim of right to the permits here involved and against the Commission's claim of power to grant them.

(3) In failing to render judgment annulling the permit orders and granting ancillary injunctive relief,

because under the law of the State the pendency of Cause No. 53915 in the District Court of Travis County, Texas, deprived the Railroad Commission **pendente lite** of jurisdiction to grant permits to Burford on the same tract there involved.

(4) In failing to render judgment annulling the permit orders and enjoining drilling and operation of the locations involved, because, if the strip may be lawfully considered as a separate tract, then as a matter of State law, the Commission's action in permitting four locations was arbitrary in view of the undisputed evidence that there is no necessity for four, or more than one, to give the owners of the strip an opportunity to recover the amount of oil in place or to prevent confiscation of their property, and that the drilling of four thereon will cause drainage of large quantities of cross-petitioners' oil and otherwise injure their property; the granting of four locations being without authority in the State law, and deprives cross-petitioners of equal protection of the law and of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(5) In failing to render judgment granting cross-petitioners' alternative prayer for injunction against production of oil from the wells in controversy until the Railroad Commission shall, after due notice and hearing, enter an order so adjusting the allowable production from the wells on the 2.33 acres that the total daily allowable from the wells thereon shall not bear a greater proportion to the total daily allowable fixed by the Commission for the wells on the remainder of the Fuller 100 acre tract than the oil reserves in place under the 2.33 acres bear to the oil

reserves in place under the remainder of the Fuller 100 acre tract, under the undisputed evidence that one well would give the strip its full share of oil, that cross-petitioners had offered to pool, and that either such pooling or adjustment of allowables would afford the owners of the strip the amount of oil under it and at the same time would prevent or greatly reduce the drainage from cross-petitioners and other injuries which will otherwise occur; it appearing as a matter of law that without such relief the granting of four wells exceeded the neccssities of the case and was arbitrary, discriminatory, and confiscatory as to cross-petitioners, denying them equal protection of the law and taking their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) In failing to hold that the trial court erred in its finding of fact No. V, to the effect that the conditions have so changed since the granting of the Hammonds permit for well No. 1 on the strip that the judgment in Cause No. 54769 is not **res adjudicata** of the permits in the case at bar.

(7) In failing to hold that the trial court erred in concluding and holding that the challenged order of the Railroad Commission does not violate any of the rights of plaintiff or intervener under the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

1. The 2.33 acre strip was voluntary subdivided for oil development purposes by lease assignment, and is too narrow to be separately developed under the spacing rule in existence at the time or any subsequent

rule. Under the settled law of the State the Railroad Commission was not authorized to grant the permits on the strip under the exception clause "to prevent confiscation of property," and its action in doing so was arbitrary and illegal.

2. Under the settled law of Texas the judgment in Cause No. 54,769, canceling a prior permit on the strip, is **res adjudicata,** establishing that the Commission could not grant a permit for the development of the 2.33 acres as a separate tract under the "confiscation of property" exception clause. It is undisputed that the west 52.33 acres from which the 2.33 acre strip was subdivided was as well protected from drainage when the Burford permits were granted as it was when the permit canceled in Cause No. 54,769 was granted; hence, there has been no material change of conditions from the standpoint of "confiscation" since that judgment was rendered.

3. Under the settled law of Texas the pendency of Cause No. 53915, involving validity of a permit previously granted to Mamie Hammonds on this same strip, and placing in issue the right to drill the strip as a separate tract, deprived the Railroad Commission of jurisdiction to grant Burford permits to drill on the strip.

4. The act of the Commission in granting a permit for four wells on the strip was invalid under the Texas law, because there was no evidence that the strip, if entitled to separate development, needed four wells to prevent confiscation (i.e., to recover its fair share of the oil), and the undisputed evidence showed that one well will produce more than the amount of oil under it.

5. The evidence heard by the District Court was not sufficient to sustain its findings and conclusions that the order attacked was valid under the State law.

6. The action of the Railroad Commission in permitting four wells on the strip in the light of the existing proration order and cross-petitioners' offer to pool their properties with the strip for development purposes, when it was undisputed that one well would have given it more than its full share of the oil, and without making proper provision for the protection of cross-petitioners' properties by adjusting the allowable of the wells on the strip, exceeded the necessities of the case, and was arbitrary, discriminatory, and confiscatory as to cross-petitioners, and denies them equal protection of the law and takes their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and the law of Texas.

7. It was the duty of the trial court and the Circuit Court of Appeals to apply the State law and grant cross-petitioners the relief they were entitled to thereunder, the federal court having jurisdiction both on grounds of diversity of citizenship and federal questions.

8. The Circuit Court of Appeals had jurisdiction to vacate or correct its original judgment and opinion in this case more than three months after the first petition for rehearing had been denied because the term of court at which judgment was rendered had not expired.

9. The Circuit Court of Appeals did not abuse its discretion in granting the second petition for rehearing because the law as announced in Selby Oil & Gas Co. v. Railroad Commission, 128 F. (2d) 334, after

overruling the first petition for rehearing, was inconsistent with the law as announced and followed in rendering the original judgment in this case and justice required that the court conform its decision thereto.

10. In the event of a remand, the trial court should independently determine any disputed fact issue in testing the validity of the permit orders involved, as required by the State law.

ARGUMENT

I.

The 2.33 acre strip was voluntarily subdivided for oil development purposes by lease assignment, and is too narrow to be separately developed under the spacing rule in existence at the time or any subsequent rule. Under the settled law of the State the Railroad Commission was not authorized to grant the permits on the strip under the exception clause "to prevent confiscation of property," and its action in doing so was arbitrary and illegal.

It was stipulated that the oil and gas lease on the Fuller tract (See area A-B-C-D, Exhibit 1, R. 104; actual acreage 102-1/3 acres, R. 108) was divided in the following manner: The owner first assigned the east 50 acres now owned by Magnolia, and thereafter in February, 1931, assigned the west 50 acres to Sun Oil Company, leaving the strip 49 feet wide between the assigned portions. (R. 109-10, 3-4, 104) At that time the spacing rule required wells to be not less than 150 feet from lines nor less than 300 feet from other wells (R. 111); hence the strip was too narrow to be

separately drilled in compliance with the rule then in effect. By all subsequent rules applicable to this field, the spacing requirements were a minimum of 330 feet from lines and 660 feet from other wells, with which requirements the strip, of course, does not comply. (R. 112-134) The original rule authorized exceptions "to protect vested rights" (R. 111), which language was subsequently changed to read "to prevent confiscation of property" (R. 133), but the Texas courts hold both phrases as used in the rule have the same meaning.[4] That the change in language did not change the meaning should be borne in mind in reading the decisions hereinafter cited.

The Railroad Commission's general order of May 29, 1934, provides that in applying the spacing rule no subdivision of property made subsequent to adoption of the original rule shall be considered in determining whether any property is being confiscated within the terms of the rule. (Allegations of Complaint, R. 8-9, undenied by answers, R. 41, 45, 49)

Both tracts created by the **original** subdivision of the Fuller tract (the east 50 and the west 52.33 acres) were sufficiently large to be drilled in compliance with the spacing rule then in effect; but of those created by the **second** subdivision, only the west 50 acres was sufficiently large and the 2.33 acre strip was too narrow. (R. 104) This latter subdivision, rather than the first, is objectionable. **Gulf Land Co. v. Atlantic Refining Co.**, 134 Tex. 59, 131 S. W. (2d) 73, 80-1; **Falvey v. Simms Oil Co.**, 92 S. W. (2d) 292.

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[4]Nash v. Shell Petroleum Corp., 120 S.W. (2d) 522, 523, writ dismissed; Lippincott v. Atlantic Refining Co., 128 S.W. (2d) 847, 848, writ dismissed, correct judgment.

According to undisputed evidence, the west 52.33 acres, without Burford's four locations, was reasonably protected from drainage and will recover its recoverable oil with the wells already drilled. (R. 367-8) Hence, such larger tract did not need these additional wells under the "confiscation" exception clause, as interpreted or defined by the Supreme Court of Texas. **Railroad Commission, et al. v. Gulf Production Co.,** 134 Tex. 122, 132 S. W. (2d) 254, 255; **Gulf Land Co. v. Atlantic Refining Co.,** 134 Tex. 59, 131 S. W. (2d) 73, 85. And even without this showing, the permit would not be sustainable on the theory that the additional wells were needed on the larger tract, because they were not granted on that basis. **Shell Petroleum Corp. v. Railroad Commission,** 133 S. W. (2d) 194, 196; **Humble Oil & Refining Co. v. Potter,** 143 S. W. (2d) 135, 136, 137; **Stanolind Oil & Gas Co. v. Midas Oil Co.,** 143 S. W. (2d) 138 (writ refused).

Burford applied for, and the Railroad Commission granted, the permits on the basis of considering the subdivision rather than disregarding it. See Burford's "Form 1" applications and plats (R. 138, 141, 147, 150); the notices of hearings issued only to owners of leases adjacent to the strip, not to those adjoining the tract from which it was subdivided' (R. 142, 152, 385, 104); and the Commisson's order granting No. 2 following the second hearing, and order granting all four locations following the third hearing, each dealing with it as a 2.33 acre tract. (Complaint, paragraph 5, R. 10-12, admitted by answers; R. 153, 30; 155, 31-2; 161)

The permits were granted on the sole ground of necessity "to prevent confiscation of property." (R. 30, 32, 153, 155)

'Notice was not sent to Amerada Petroleum Corporation whose lease adjoins the northwest portion of the Fuller tract.

The Burford strip having been created by voluntary subdivision from the west 50 acres in such width that it cannot be drilled in compliance with the spacing rule in existence at the time, under the settled law of Texas the Railroad Commission was without power to grant an exception to the spacing rule authorizing drilling of wells on the strip on the ground of necessity "to prevent confiscation of property," and therefore the Burford permit orders are void. **Gulf Land Company v. Atlantic Refining Company,** 134 Tex. 59, 131 S. W. (2d) 73, 81, holding with reference to such subdivisions, "exception permits may be issued to protect such tracts from waste; but such exception permits cannot be issued to protect such tracts, as such, from confiscation."

This was the established law of the State even before the Railroad Commission adopted its order of May 29, 1934. **Sun Oil Company v. Railroad Commission,** (Civ. App.) 68 S. W. (2d) 609, 613, affirmed 125 Tex. 540, 84 S. W. (2d) 693, applying this same rule and explaining the underlying reason therefor to be that the spacing rule, validly issued and operating prospectively, has the same force and effect as a legislative act, and therefore all parties dealing with mineral leasehold titles must take cognizance of the rule and make their contracts and conveyances in keeping with its terms and not in violation of it, so that no right to an exception can arise from the carving out of a tract, while the rule is in effect, in such shape or size that no well can be drilled thereon in compliance with the rule; that to hold otherwise would set at naught the conservation laws of the state; and that the Commission, while keeping the general spacing rule in effect, cannot itself arbitrarily grant

exceptions thereto which would indubitably destroy the efficacy of the rule itself.

Other decisions enforcing this rule are **Brown v. Humble Oil & Refining Co.**, 126 Tex. 296, 83 S. W. (2d) 935, 945; **Lippincott v. Atlantic Refining Co.**, (Civ. App.) 128 S. W. (2d) 847, 848; **Humble Oil & Refining Co. v. Railroad Commission**, 68 S. W. (2d) 625 (application for writ dismissed); **Smith v. Stewart**, 68 S. W. (2d) 627, affirmed 83 S. W. (2d) 945; **Railroad Commission v. Lamb**, 81 S. W. (2d) 161, 163; **Barnsdall Oil Co. v. Railroad Commission**, 83 S. W. (2d) 714 (writ refused); **Smith v. Shabay**, 83 S. W. (2d) 719; **Humble Oil & Refining Co. v. Railroad Commission**, 85 S. W. (2d) 813 (application for writ dismissed); **Edgar v. Stanolind Oil & Gas Co.**, 90 S. W. (2d) 656, 657 (writ refused); **Barnsdall Oil Co. v. Railroad Commission**, 90 S. W. (2d) 663; **Shell Petroleum Co. v. Burnett**, 91 S. W. (2d) 1091; **Railroad Commission v. Royal Petroleum Corp.**, 93 S. W. (2d) 761 (writ dismissed); **Stanolind Oil & Gas Co. v. Railroad Commission**, 92 S. W. (2d) 1057 (writ refused); **Empire Gas & Fuel Co. v. Railroad Commission**, 94 S. W. (2d) 1240, 1242 (writ refused); **Railroad Commission v. Wood**, 95 S. W. (2d) 1328 (writ refused); **Murphy v. Turman Oil Company**, 97 S. W. (2d) 485, 487 (writ dismissed); **Tide Water Associated Oil Co. v. Railroad Commission**, 120 S. W. (2d) 544, 545.

The Railroad Commission cannot grant permits in disregard of its own rule, and if it does they are void and the courts will annul them. **Sun Oil Company v. Railroad Commission**, (Civ. App.) 68 S. W. (2d) 609, 612; **Atlantic Oil Production Co. v. Railroad Commission**, 85 S. W. (2d) 655, 657 (writ dismissed); **Brown v. Humble Oil & Refining Co.**, 126 Tex. 296, 83 S. W.

(2d) 935, 944-5; **Gulf Land Company v. Atlantic Refining Co.**, 134 Tex. 59, 131 S. W. (2d) 73, where in affirming judgment canceling a permit, the court said (p. 79) "We think the Commission is bound by its own rule . . . . " and (p. 86) "It is evident from what we have said that we hold the Commission violated its own order in issuing this well permit to prevent confiscation of property."

Petitioners cannot escape the effect of the subdivision rule on the theory that this 2.33 acre strip is in "substantial compliance" with the spacing rule in effect when the subdivision was made. Many Texas cases hold strips wider and containing more acreage than this one are in violation of the rule and none hold that a strip this narrow is in "substantial compliance."

The two cases relied upon by petitioners involved strips 280 feet and 260 feet wide, respectively, and the opinions clearly show that the court would not have regarded as analogous the 49 foot strip involved in this case, and would not have held it to be in "substantial compliance."

The tract involved in **Humble Oil & Ref. Co. v. Railroad Commission**, 94 S. W. (2d) 1197 was 280 feet wide, so that a location in the center lacked only 10 feet of being the distance from the sides required by the spacing rule in effect at the time the tract was subdivided from adjoining land. The location fell 140 feet from the north and south lines instead of the required 150 feet. It is apparent that when equidistant offsets to such application are drilled, they would then be 280 feet apart instead of the required 300 feet, which would be only 20 feet short of the required distance of 300 feet under the 150-300 foot spacing provisions of Rule 37 in effect when the subdivision was

made. These shortages are only 6.6% of the required distances. We especially call the court's attention to the reasoning of the Court of Civil Appeals. (94 S. W. (2d) at 1199).

Likewise **Wencker v. Railroad Commission**, 149 S. W. (2d) 1009, is distinguishable on the facts. It involved the right to drill on a 7.88 acre tract having an average width of approximately 260 feet and an average length in excess of 1600 feet, which had been subdivided from adjoining lands while the 150-300 foot spacing provisions of Rule 37 were in effect. We call attention to the reasoning of the Court. (149 S. W. (2d) at 1010, 1012, 1013).

It is to be noted that a well in the center of the Wencker tract would be 130 feet from the sides (only 20 feet short of the required distance of 150 feet), and that direct offsets to such a well would be 260 feet distant, which is only 40 feet short of the required distance of 300 feet between wells. These shortages are only 13.2% of the required distances.

These slight variances in the Humble and Wencker cases are trivial indeed when compared with the 49 foot strip involved in the case at bar. A well in the center of the strip here involved would be only 24.5 feet from the sides, and direct offsets to wells on the strip would be only 49 feet distant, instead of the required 300 feet. The extent of compliance would be only 16.3% of the required distances, and the violation or non-compliance would be 83.7%. Clearly, the development of this strip as a separate tract would bring about a most flagrant violation of the spacing provisions, and a far more serious situation is involved than the minor discrepancies in the Humble and Wencker cases.

In **Sun Oil Co. v. Railroad Commission, et al.,** (Civ. App.) 68 S. W. (2d) 609, 610, a strip containing **2.59 acres, 33 feet wide by 3342 feet long,** was subdivided (according to the permittee's contention, on which basis the case was tried) on July 21, 1930, while the 150-300 foot rule was in effect. The court held this strip was a subdivision in derogation of the spacing rule, not entitled to separate development as such. (**Affirmed** by the Supreme Court of Texas, 125 Texas 540, 84 S. W. (2d) 693.)

In **Smith v. Stewart,** (Civ. App.) 68 S. W. (2d) 627, 628, the strip was **1234 feet long, 104 feet wide at one end, 37 feet wide at the other, and contained 1.8 acres.** It was subdivided from a larger tract capable of development as a whole on April 19, 1929, while the 150-300 foot rule was in effect. The Court held this was a subdivision in derogation of the spacing rule and that the strip was not entitled to separate development. This holding was **affirmed** by the Supreme Court of Texas in **Stewart v. Smith,** 126 Texas 292, 295, 83 S. W. (2d) 945, 946. The acreage of 1.8 is not substantially different from 2.07 acres, which petitioners are insisting is the test.

In **Smith v. Shabay,** (Civ. App.) 83 S. W. (2d) 719, 720, the strip contained **7.5 acres, and was 1825 feet long, 175 feet wide at one end and 185 feet wide at the other.** It was subdivided from adjoining land capable of development as a whole in compliance with the 150-300 foot rule by leases dated April 21, 1928, and March 26, 1930. The court held this subdivision was in violation of the rule and that the strip was not entitled to separate development as such. Apparently writ of error was not applied for.

In **Humble Oil & Refining Co. v. Railroad Commission,** (Civ. App.), 85 S. W. (2d) 813, 815 (petition for writ of error dismissed), the strip involved was **80 feet wide and 2640 feet long,** containing a total of **5.87 acres.** Note that it is wider, longer, and larger than the Burford strip. It was subdivided in 1928, while the 150-300 foot rule was in effect, from adjoining land capable of development as a whole in compliance with that rule; and the court held that the subdivision was in violation of the rule and that the strip was not entitled to development as such. The court held void the permit granted by the Commission.

In **Edgar v. Stanolind Oil & Gas Co.,** (Civ. App.) 90 S. W. (2d) 656, 657 (writ of error **refused** by the Supreme Court of Texas), the strip involved was **132 feet wide at the north end, 70 feet wide at the south end, 1600 feet long and contained 3.99 acres.** It was created on September 18, 1930, while the 150-300 foot rule was in effect. The court held the subdivision was in violation of the rule and that the strip was not entitled to development as a separate tract, and canceled permit under attack in that case. **By the refusal of writ of error the Supreme Court of Texas placed its stamp of approval upon this opinion and holding.**

In **Tide Water Associated Oil Company v. Railroad Commission, et al.,** (Civ. App.) 120 S. W. (2d) 544, 545, the strip involved was **105 feet wide and 825 feet long,** containing a total of **2.00416 acres.** The strip was created by subdivision "early in 1931," and the Examiner's Memorandum mentioned that the acreage was in "substantial compliance" with 2.07 acre spacing which results from spacing wells 300 feet apart. But the court held that this subdivision was in derogation

of the spacing rule, and the strip was not entitled to a permit to protect vested rights. (Actually, the permit was upheld on the theory that it was necessary to prevent waste, but that point is immaterial to the one now under discussion.) Writ of error was not applied for.

In **Railroad Commission v. Wood,** 95 S. W. (2d) 1328, 1329 (writ of error **refused** by the Supreme Court of Texas), the strip involved was **300 feet long and 277 feet wide, containing 2 acres.** It was subdivided from adjoining land "in 1930 or 1931," while the 150-300 foot rule was in effect, and it was held this subdivision was in derogation of the rule and that the 2 acres was not entitled to separate development.

It should be borne in mind that Rule 37 did not mention "2.07 acres," which petitioners assert is the deciding test of "substantial compliance." The rule provides only that wells shall not be less than 150 feet from property lines or less than 300 feet from other wells. (R. 111) It speaks in terms of spacing distances, not in terms of acreage. If the strip involved in the Wood case was a violation of the rule, how can it be said that the Burford strip is a compliance with it?

In **Magnolia Petroleum Co., et al., v. Railroad Commission, et al.,** (Civ. App.) 127 S. W. (2d) 230, 231, 232-3, (writ of error dismissed, W.O.J.), the Commission had granted permit to drill a well on **5.08 acres,** being a strip **141 feet wide and 1565 feet long.** The case was tried on the permittee's theory that this 5.08 acres had not been included by the lessor in a lease of adjoining land in 1930 while the 150-300 foot rule was in effect; and the Court held that the strip constituted a voluntary subdivision which gave no vested

right entitling the owner of the mineral estate therein to a permit to drill the strip separately. Thus, the court did not regard this strip as a "substantial compliance," although it is **more than twice as large and almost three times as wide as the Burford strip.** (Actually, the permit was upheld on another and different theory based on the holding of the Texas Supreme Court in the so-called "Century case," the law on which other theory has since been changed by subsequent holding of the Supreme Court of Texas in **Gulf Land Company v. Atlantic Refining Co.**, 134 Texas 59; but this is immaterial to the point under discussion.)

In **Stanolind Oil & Gas Co. v. Midas Oil Company**, (Civ. App.) 143 S. W. (2d) 138, 139, 140 (writ of error **refused** by the Supreme Court of Texas), the Commission had granted permit to drill a well on a **2.14 acre strip, 1200 feet long by 70 feet wide,** which had been subdivided in 1931 from adjoining land while the 150-300 foot rule was in effect. (The opinion, page 139, refers to opinion of the court in a prior appeal of the same case for full statement of the facts, **Stanolind Oil & Gas Co. v. Midas Oil Co.**, (Civ. App.) 123 S. W. (2d) 911, in which the facts appear on pages 912 and 914). The court held that this 2.14 acre tract was not entitled to an exception for separate development (p. 139), being "a voluntary subdivision after Rule 37 became applicable to it" (p. 140). **It will be noted that this strip contained more than 2.07 acres, is wider than the Burford strip and that the Supreme Court of Texas by refusing writ of error has approved this holding of the Court of Civil Appeals.** The refusal of this writ is, so far as we can find, the last official pronouncement by the Supreme Court of Texas, either

by opinion or by approval of opinion, relating to this question of "substantial compliance."

The purpose of the spacing rule was to achieve even distribution of wells and even withdrawal of oil, thus preventing waste, not merely to achieve an "average density" of 2.07 acres per well, which could be accomplished, for instance, by drilling 10 wells in **one corner** of a 20.7-acre lease and none on the remainder of the tract. The purpose of the rule is not fulfilled by granting wells 24 feet from lines and offsets 49 feet away.

We have examined on its merits the applicability of the "substantial compliance" theory to the Burford strip. **But petitioners' contention that this strip is entitled to separate development is not sustainable for the additional reason that this very issue has heretofore been litigated to final judgment adverse to petitioners, in a prior suit between cross-petitioners, the Railroad Commission of Texas and Burford's predecessors in title,** which judgment is asserted as **res adjudicata.**

II.

Under the settled law of Texas the judgment in Cause No. 54,769, canceling a prior permit on the strip, is res adjudicata, establishing that the Commission could not grant a permit for the development of the 2.33 acres as a separate tract under the "confiscation of property" exception clause. It is undisputed that the west 52.33 acres from which the 2.33 acre strip was subdivided was as well protected from drainage when the Burford permits were granted as it was when the permit canceled in Cause No. 54,769 was granted; hence, there has been no material change of conditions

from the standpoint of "confiscation" since that judgment was rendered.

On October 11, 1934, before the strip was assigned to Burford and X Y Z Company, the Commission granted Mamie Hammonds permit to drill on this same strip (R. 163), and in Cause No. 54769 (consolidated with No. 54743), District Court of Travis County, Texas, cross-petitioners obtained a final judgment (R. 185) against the Railroad Commission, Hammonds and others (predecessors of Burford and X Y Z Company—R. 212), canceling the permit order on allegations that it was granted in violation of the spacing rule and that the strip was not entitled to development as a separate tract. (R. 164, 174-6) The judgment in the consolidated cause found the law and the facts to be with the plaintiffs, canceled the permit and perpetually enjoined the drilling and operation of the well. (R. 186-8) The Hammonds permit was granted both to prevent waste and to protect the property from confiscation. (R. 190-1, 155, 32)

Cross-petitioners urged the judgment as **res adjudicata** before the Commission (R. 234-6, 296, 330-1, 157), and in their Complaints assert that there has been no such change of conditions as would entitle the strip to a permit, the reservoir conditions under the strip being the same and bearing the same relation to the reservoir conditions in the field generally as at the date of said judgment and date of the permit thereby canceled; and that the Burford locations are no more necessary than the location canceled by said judgment. (R. 12-13) Undisputed testimony shows there had been no change of conditions requiring any of Burford's well locations to enable the west 52.33 acres of the

Fuller tract to recover the equivalent of the oil under it or to protect it from drainage, and the west 52.33 acres is as well protected from drainage and is recovering the oil through existing wells as efficiently as it was when this prior permit was granted. (R. 375-6) This was corroborated by defendants' witness. (R. 395-6)

Shell Petroleum Corp. v. Railroad Commission, 86 S. W. (2d) 57, 59 (writ dismissed), involved a suit to cancel a permit which had been granted by the Commission on the same grounds as a former permit canceled in a prior suit between the same parties. The later permit moved the location 30 feet. The court held the **general judgment** rendered in the former suit, finding both the law and the facts with the plaintiff, constituted **res adjudicata** of these issues in the second suit, stating:

> "Applying these rules to the instant case the following appears: In the former suit, judgment in which is here pleaded as res adjudicata, the same relief was sought as in this suit. * * * In that case a general judgment was rendered by the court without indicating upon what grounds it was based. None of the issues made by the pleadings and the evidence in that case were by the court excluded 'from the effect of the adjudication.'
>
> "In the case at bar the same subject-matter between the same parties is involved . . . the identical issues of drainage and waste were pleaded; and the same evidence on these issues was before the court in both cases. Thus not only were these same issues made by the pleadings in both cases, but the same evidence used in both. That being true, under well-settled rules of law,

> the judgment rendered in the former trial, and pleaded herein, is conclusive of the issues presented in the instant case, and the trial court should have so held."

The judgment canceling the Hammonds permit in Cause No. 54,769, was a **general judgment,** and the subdivision question here raised was raised and adjudicated in the former suit. While the testimony offered in the former suit has not been reoffered in this suit, that is immaterial, because the facts as to subdivision are established by the lease and the assignments, which are necessarily the same; and the undisputed proof in this record is that the west 52.33 acres is still protected from confiscation as it was when the Hammonds permit was granted; hence, the fact that additional wells have been drilled and oil has been produced and the pressure thereby lowered are immaterial changes. They are not changes to the disadvantage of the west 52.33 acres. In fact, defendants' witness testified the 52.33 acres is better off now than it was when the Hammonds permit was granted. (R. 396)

On this point the Supreme Court of Texas stated in **Magnolia Petroleum Co. v. New Process Production Co.,** 129 Tex. 617, 104 S. W. (2d) 1106, 1110:

> "We will say, however, that we are of the opinion that the Railroad Commission is without power to review or set aside judicial orders and decrees. In such instances the commission can only grant an application for a well where there is a showing of changed conditions."

In **Railroad Commission (Acme) v. Humble Oil & Refining Co.,** 119 S. W. (2d) 728, 729, 730 (writ re-

fused), a judgment in a prior suit canceling a permit was held to be **res adjudicata** of a subsequently granted permit; and in overruling the contention that there had been a change of conditions, the court held that the change necessary to defeat the plea of **res adjudicata** must be **material**; and that the drilling of 3500 additional wells in the field, and the reduction of the bottom hole pressure in the area, and the reduction of the allowable per well, all of which were common to the field as a whole, and the changing of the location 20 feet in the new permit, were not material changes, and did not remove the bar of **res adjudicata.**

The doctrine of **res adjudicata** in these suits has been recognized in prior decisions of the Federal Court.

In **Smith v. Merrill,** 81 Fed. (2d) 609 (C.C.A. 5th). the facts were that Merrill had brought a prior statutory suit in the District Court of Travis County, seeking to set aside the action of the Commission in denying him permit to drill, and to enjoin interference with the drilling and operation of, his proposed well, and a general judgment had been rendered that plaintiff take nothing. He thereafter brought a suit in Federal District Court complaining of the action of the Railroad Commission in denying him permit to drill on the same tract at a location 50 feet from the prior location. The court held that every essential element to support **res adjudicata** was present and sustained the plea.

In **Gulf Land Co. v. Atlantic Refining Co.,** 113 Fed. (2d) 902, 905 (C.C.A. 5th), the appellant contended a judgment canceling a prior permit granted to prevent confiscation was not **res adjudicata** of a sub-

sequent permit in so far as it was granted to prevent confiscation, because additional wells had been drilled on the land adjacent to a 6.88 acre tract, from which the Gulf Land Company 2.35 acres had been subdivided. The court overruled that contention with the following holding:

> "The facts which appellants claim make the situation different now from what it was when the permit was granted before do not do so. They merely show that there has been a lessening of some of the great disadvantages, under which owners of tracts adjoining the 6.88 acre tract have been laboring. They do not show that all of these disadvantages have been taken away, much less do they show that the 6.88 acre tract has been put at a disadvantage requiring the issuance of the permit to prevent confiscation.
>
> "We agree with the District Judge therefore that on the question of confiscation the pleaded judgment was res adjudicata of that issue." (p. 905)

It is true that the court in the Gulf Land Company case overruled the plea of **res adjudicata** in so far as the second permit was granted to prevent waste, whereas the prior permit had not been granted on that ground. However, this fact presents no material distinction in the case at bar, because the permits here involved were granted solely to prevent confiscation, whereas the permit canceled in Cause No. 54769 was granted both to prevent confiscation and waste; and a permit granted on one ground is not sustainable on another ground. **Gulf Land Co. v. Atlantic Refining Co.**, 134 Tex. 59, 131 S. W. (2d) 73.

There have been no material changes in conditions in the case at bar, because the Commission had no more legal authority to grant a permit on the 2.33 acre strip separately, to prevent confiscation in 1939 than it did in 1934. At neither time did the Commisson have such authority. Furthermore, although the Commission should have considered the matter from the standpoint of the west 52.33 acres, but did not, the undisputed proof shows that on the ground of "confiscation" additional wells on the 52.33 acres are no more necessary now than formerly, to enable the west 52.33 acres to recover its fair share of the oil, which is the test so far as concerns the term "confiscation" as used in the spacing rule.

While Burford and X Y Z Oil & Gas Company were not parties to appellants' suit against Mamie Hammonds and Schroeder, they are nevertheless bound by that judgment because the doctrine of **res adjudicata** extends not only to the immediate parties, but also to those who stand in privity with them, and they hold the interest they acquired by assignment from Hammonds and Schroeder subject to that judgment. **Cain v. Balcom**, 130 Tex. 497; **Crane v. Blum**, 56 Tex. 325.

The proper court of the State in Cause No. 54,769 had already finally adjudicated that this strip was not entitled to development as a separate tract. This condition has in nowise changed, nor can it change, until the strip is consolidated with some adjoining land, such as the west 50 acres from which it was subdivided.

In **Edgar v. Stanolind Oil & Gas Co.**, (Civ. App.) 98 S. W. (2d) 222 (writ of error dismissed), the court referred to its holding in a former suit (**Edgar v. Stanolind Oil & Gas Co.**, 90 S. W. (2d) 656, writ re-

fused), and observed that it had canceled the permit in the former suit on three grounds, the second ground being that the strip had been voluntarily subdivided from a larger tract after Rule 37 was in force; **and held that the Commission was without power to grant a permit on the same subdivided strip, considered separately, under the exception clause "to prevent confiscation," on the theory that there had been a "change of conditions."** The court said, p. 233, ". . . but the second ground adjudicated Edgar's right to well No. 3 under conditions then or thereafter existing under Rule 37. **There was nothing left within the Commission's powers or jurisdiction to pass upon."**

This result necessarily flows from the holding of the Supreme Court of Texas in **Gulf Land Company v. Atlantic Refining Co.**, 134 Tex., 59, that a tract subdivided in violation of the spacing rule is not entitled to protection against confiscation, and that the Commission has no power to grant it a permit on that ground. The Commission did not disregard the subdivision when it granted the Hammonds and Burford permits, and each was granted under the "confiscation" exception clause. We submit it is not legally possible for there to have been a change of conditions entitling the Commission to disregard now the fact that the strip is a subdivision in violation of its rule.

But even if that were possible as a legal proposition, what material changes, if any, have taken place? First, petitioners say that there have been three or four additional wells drilled on the Sun lease, and at least two additional wells on the Magnolia lease. How is that material? It might tend to show that there is **more** drainage from the strip now than there

was in the past, but that could not possibly be the test, for a tract that is entitled to separate development under the rule is entitled to **at least one well as a matter of law,** whether it is being drained or not, and even though such well might give the strip an advantage over its neighbors or cause waste. **Dailey v. Railroad Commission,** (Civ. App.) 133 S. W. (2d) 219, 221 (writ of error refused); **Wencker v. Railroad Commission,** (Civ. App.) 149 S. W. (2d) 1009, 1012; **Stanolind Oil & Gas Co. v. Railroad Commission,** (Civ. App.) 96 S. W. (2d) 664.

Petitioners further say the judgment is not **res judicata** because there have been "notorious changes in pressure, water encroachment and heavy withdrawals of oil." This is not a material change of conditions, because those changes are common to the entire field. See express holding in **Railroad Commission (Acme) v. Humble Oil & Refining Company,** (Civ. App.) 119 S. W. (2d) 728 (writ refused.)

Petitioners point to no evidence whatever of any reason why this strip is now entitled to separate development that would not have been equally applicable at the time the judgment was rendered in the former case, and the judgment is clearly **res adjudicata.**

III.

Under the settled law of Texas the pendency of Cause No. 53915, involving validity of a permit previously granted to Mamie Hammonds on this same strip, and placing in issue the right to drill the strip as a separate tract, deprived the Railroad Commission of jurisdiction to grant Burford permits to drill on the strip.

Cause No. 53915, styled Sun Oil Company v. Railroad Commission and Mamie Hammonds, in which Magnolia intervened, was pending in the District Court of Travis County for final trial at the time Burford's application was filed, heard and granted by the Railroad Commission. (R. 205-6, 208) Said suit was for the purpose of canceling still another order granting Mamie Hammonds permit to drill on this same strip, and it was an issue in said suit that the strip, being a subdivision, was not entitled to be developed as a separate tract under the spacing rule. (R. 192, 197-8, 203)

Cross-petitioners urged before the Railroad Commission that it was without jurisdiction of Burford's application because of the pendency of said suit (R. 157, 236-7, 238, 295, 331), and the complaint asserts that Burford's permits were void because the Commission was without jurisdiction. (R. 13-14)

Under the law of the State the Railroad Commission is without jurisdiction to grant additional permits on a tract while the courts are in the process of determining validity of a drilling permit previously granted on the same tract. The Railroad Commission had no jurisdiction to grant the Burford permits, and they are void under the established law of the State. **Stewart v. Smith,** 126 Tex. 292, 83 S. W. (2d) 945, 947, holding " . . . after the judicial arm of the state had assumed jurisdiction of the matter, the Railroad Commission undertook to act again * * * the Railroad Commission was without jurisdiction." **Gulf Oil Corporation v. Rudco Oil & Gas Co.,** (Civ. App., 1942) 164 S. W. (2d) 222; **Barnsdall Oil Co. v. Railroad Commission,** (Civ. App.) 90 S .W. (2d) 663, 664; **Edgar v. Stanolind Oil & Gas Co.,** (Civ. App.)

90 S. W. (2d) 656 (writ refused); **Turnbow v. Barnsdall Oil Co.**, (Civ. App.) 99 S. W. (2d) 1096, 1100 (writ refused); **McNeny v. Railroad Commission,** (Civ. App.) 96 S. W. (2d) 96, 98-9, holding:

> ". . . as long as a suit is pending to test the validity of a permit to drill on a specific tract of land as an exception to rule 37, the Commission is deprived of all jurisdiction to entertain or consider a subsequent application for such permit, and any order it may enter in that regard is void."

In support of their contention that the Hammonds permit involved in Cause No. 53915 had been abandoned, petitioners cite only a statement to that effect made by the attorney for Burford. No evidence of abandonment was offered. The attorney's statement is not evidence, and is conclusively refuted by the record, which shows that Cause No. 53915 was still pending when the Burford application was heard (R. 236-7, 238) and the final judgment thereafter entered in the cause by the District Court recites that all parties appeared for trial, that the court heard the evidence and the argument of counsel and the court rendered judgment. (R. 208-9) In the McNeny case, **supra,** this same contention was urged and overruled, the court holding that so long as the permittee remained in a defensive position in the pending suit to cancel the permit, there is no abandonment; and that is the situation here, as shown by the final judgment in Cause No. 53915.

Petitioners contention that the pendency of Cause No. 53915 did not deprive the Railroad Commission of jurisdiction because the permit involved in that case was void for want of notice and hearing is contrary

to the holding in **Barnsdall Oil Co. v. Railroad Commission,** 90 S. W. (2d) 663-4, and **McNeny v. Railroad Commission,** 96 S. W. (2d) 96.

The State law on this point is settled beyond question.

IV.

The act of the Commission in granting a permit for four wells on the strip was invalid under the Texas law, because there was no evidence that the strip, if entitled to separate development, needed four wells to prevent confiscation (i.e., to recover its fair share of the oil), and the undisputed evidence showed that one well will produce more than the amount of oil under it.

It was shown that Burford did not contend he needed four wells to enable him to recover the equivalent of the oil in place under the strip (R. 233-293, 294 317, 318-365), but that one well on the strip would produce more oil than there is under it. (R. 362-3) The Commission's proration order allowed each well in the area to produce up to a flat 20 barrels per well daily, irrespective of the size of the tract or reserves in place. (R. 370) Sun's 50 acre lease had seven wells and Magnolia's 50 acre lease had six wells (R. 18, 104, 141), from which it follows that the allowable of four wells on the strip would be approximately 4/7th as great as the total allowable from Sun's 50 acres and approximately 2/3rds as great as the total allowable of Magnolia's 50 acres; and this will result in drainage from the adjacent tracts. (R. 349-350; 368-9) It is undisputed that with four wells on the strip, Sun would lose between 70,000 and 100,000 bar-

rels of oil which its wells might otherwise have produced, valued at $1.10 per barrel (R. 369), and Magnolia's loss of oil to the Burford locations will be about 50% as much as Sun's loss. (R. 377) The four locations on the strip are each approximately 24 feet from cross-petitioners' leases, whereas cross-petitioners' nearest wells are roughly 330 feet from the strip (R. 104), and allowance of the Burford locations will make it necessary for Sun and Magnolia to drill additional wells "just to meet the offsets." (R. 368-9) The high concentration of wells which would result would lower the pressure, reduce the flowing life, increase the operating expenses, and thereby cause loss to cross-petitioners. (R. 371, 376-7) Cross-petitioners expressly urged before the Commission that four wells on the strip as a separate tract were not necessarily to give it an opportunity to produce the equivalent of the oil under it; that one well would give it a great advantage over cross-petitioners' leases, and four wells would confiscate their property without compensation and deny them due process of law and equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. (R. 158)

The "confiscation" exception clause in the spacing rule relates to giving a tract, entitled to development, such number of wells as are necessary to enable the owner thereof to recover the oil and gas in place under the tract, **or their equivalents in kind. Gulf Land Co. v. Atlantic Refining Co.**, 134 Tex. 59, 131 S. W. (2d) 73, 85; **Railroad Commission et al. v. Gulf Production Co.**, 134 Tex. 122, 132 S. W. (2d) 254, 255. Obviously, the Commission made no attempt to apply the term in that sense to this 2.33 acre strip in grant-

ing it four wells, when the undisputed testimony showed that one would produce more than the oil in place under it; and as stated in **Atlantic Refining Co. v. Buckley,** (Civ. App.) 123 S. W. (2d) 413, 415 (writ dismissed), "The net result of this would be that under the guise of protecting this small tract from confiscation, he would be enabled to confiscate oil from adjacent tracts."

In the Gulf Land Company case, the Texas Supreme Court said, page 85:

> "In administering our oil and gas conservation statutes, **the Commission must be fair, and must not indulge in unreasonable discriminations between different oil fields, or between different tracts of land in the same field.** * * *
>
> "In the exercise of its power to grant exceptions to its rules, it is the duty of the commission to treat all interested parties justly, fairly, and impartially under all the facts and circumstances of the case; * * *" (Emphasis ours)

The Commission is without power, under the confiscation ground of exception, to grant a tract permits for more wells than are necessary for such purpose, and therefore its action in granting four, when one will produce more than the oil under the strip, was arbitrary and should be annulled. **Railroad Commission, et al. v. Gulf Production Co.,** 134 Tex. 122, 132 S. W. (2d) 254, affirming opinion of Court of Civil Appeals in 115 S. W. (2d) 505; **Gulf Land Co. v. Atlantic Refining Co.,** 134 Tex. 59, 131 S. W. (2d) 73; **Atlantic Oil Production Co. v. Railroad Commission,** (Civ. App.) 85 S. W. (2d) 655; **Edgar v. Stanolind Oil & Gas Co.,** (Civ. App.) 90 S. W. (2d) 656,

658 (writ refused); **Railroad Commission v. Arkansas Fuel Oil Co.**, (Civ. App.) 148 S. W. (2d) 895, 898; **Gulf Oil Corporation v. Smith**, (Civ. App.) 145 S. W. (2d) 280, 283; **Allen v. Gulf Oil Corporation**, (Civ. App.) 139 S. W. (2d) 207, 209; **Spear v. Humble Oil & Refining Co.**, (Civ. App.) 139 S. W. (2d) 212, headnote 3; **Shell Petroleum Corporation v. Railroad Commission**, (Civ. App.) 137 S. W. (2d) 797, 798.

Even if the court had been authorized under the State law to hold that this strip was entitled to separate development, there was no evidence of a necessity for granting the strip four wells, or any number more than one, to prevent confiscation. Petitioners have wholly failed to point out any evidence refuting the undisputed testimony that one well would give the strip its full share of the oil, and an advantage in drainage opportunity over all adjacent tracts.

Petitioners' Brief, page 5, states that cross-petitioners' leases had already produced about 5,000 barrels of oil per acre but the oil had been fully replaced by migration; and further insists on page 32 that the Commission did not abuse its discretion in grantng four wells instead of one. They point to no evidence showing a necessity for four. The mere fact that the adjoining leases had produced 5,000 barrels per acre does not negative the undisputed testimony of the petroleum engineer that, in the light of the future life of the area and the present allowables, one well on the strip would produce more oil than is under it.

What possible difference could it make that the adjoining leases have produced oil in the past, if Burford by operating one well in the future can obtain more than his share? **At the hearings before the Commission it was not contended that this strip needed**

four wells in order to obtain its share of the oil or to catch up with past production of the adjoining leases, (R. 233, 294, 318) and the Commission has not so decided, and had no evidence before it developing this new idea advanced by petitioners for the first time on appeal. The sole reason for four wells urged by Burford at the hearing was that they were necessary to prevent waste—a theory rejected by the Commission in granting the permit solely to prevent confiscation. (R. 30, 32, 153, 155)

The force which has replenished the oil under cross-petitioners' leases must also have kept the Burford strip full of oil, and the strip still has in place its original quantity and has suffered no net loss through past production from neighboring leases.

Petitioners are clearly in error in stating that the granting of four wells instead of one involves a mere matter of discretion with the Railroad Commission, with which the courts will not interfere. They do interfere under the State law. Witness the many cases cited, supra, p. 38, in each of which the court canceled permits for additional wells, granted under the "confiscation" or "vested rights" exception clause, where the evidence showed that the tract did not need additional wells for that purpose, and the Commission, therefore, had abused its power in granting additional wells.

V.

The evidence heard by the District Court was not sufficient to sustain its findings and conclusions that the order attacked was valid under the State law.

This contention, in reply to petitioners' fourth point, is sufficiently presented by the argument under the foregoing points.

VI.

The action of the Railroad Commission in permitting four wells on the strip in the light of the existing proration order and cross-petitioners' offer to pool their properties with the strip for development purposes, when it was undisputed that one well would have given it more than its full share of the oil, and without making proper provision for the protection of cross-petitioners' properties by adjusting the allowable of the wells on the strip, exceeded the necessities of the case, and was arbitrary, discriminatory, and confiscatory as to cross-petitioners, and denies them equal protection of the law and takes their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and the law of Texas.

As hereinabove shown one well on the strip would give it more than its fair share of the oil, and four wells on the strip, although granted on the "confiscation" ground, are not necessary for such purpose, but will cause great injury to cross-petitioners.

Cross-petitioners tendered before the Commission (R.158) and also in court (R. 19) an offer to pool their leases with the strip for development as an entire tract in either of three ways: (a) the strip and the Sun lease; (b) the strip and the Magnolia lease; and (c) one half of the strip with the Sun lease and one half with the Magnolia; and under either method offered to share ratably the future production from the pooled property in proportion to the acreage so contributed by each owner, less deduction in the same proportion for future drilling and operating expenses.

Cross-petitioners, in the alternative, requested the Commission, in case it should hold that there is any reasonable basis for permitting the drilling of each or either of said four locations on the strip as a separate tract, to so adjust the allowable production of such locations as the Commission should decide to permit on the strip, and so condition the permit therefor, that the total daily allowable production from the 2.33 acre strip shall not exceed 2.33/100th of the total daily allowable production for the remaining and adjoining 100 acres of the Fuller tract; and urged that such provision and condition would enable Burford to produce only his fair share of the oil in place. (R. 159-160) The Commission denied all relief so requested by cross-petitioners. (R. 161)

The Complaint expressly alleged that four wells are not needed to give the strip an opportunity to produce its share of the oil, that one well would give it more than its share, and the other injurious effects upon cross-petitioners resulting from granting four wells (R. 17-18, 21-23, 26-27); that the granting of four wells was in violation of the State law (R. 12); that they have no recourse for the value of the oil and gas which will be drained from their property (R. 23); that the granting of four wells under those circumstances denies them equal protection of law and deprives them of their property without due process of law (R. 23); that if there was any basis for granting four wells, the order was nevertheless unreasonable, discriminatory, and confiscatory in the light of the allowable order, because the Commission could have adjusted the allowable, thereby materially lessening the injury to cross-petitioners, and the granting of the permits without such adjustment or other proper pro-

vision for the protection of their property exceeded the necessities of the case and is arbitrary, unreasonable, discriminatory, and confiscatory, violating their rights under the Fourteenth Amendment to the Constitution of the United States and the State law. (R. 24-5)

Undisputed testimony shows that the granting of the alternative request for adjustment of allowable would have given Burford his share of the oil and would have lessened the drainage from cross-petitioners' leases. (R. 370-1)

In **Brown v. Humble Oil & Refining Co.**, 126 Tex. 296, 83 S. W. (2d) 935, 944, the Supreme Court of Texas held:

> "The exercise of the police power under this rule does not change the rule of property. It merely regulates and controls the way in which his property shall be used and enjoyed. **Each person still owns the oil and gas in place under his land, and each still has the right to possession, use, enjoyment, and ownership of the oil and gas produced through wells located on his land, regardless of its origin. The primary rule of ownership is still operative. The rule of convenience becomes secondary.**" (Emphasis ours.)

It further held that if conditions arise where it would be proper to drill on a subdivided strip,

> "**. . . in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas.** By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recov-

erable oil and gas under his land." (Emphasis ours.)

In **Magnolia Petroleum Co. v. Blankenship,** (CCA 5) 85 F. (2d) 553, 555, 556, the Federal court recognized the above as the law of the State, and we quote from the opinion:

> **"But by thus limiting the sinking of new wells and the production from old ones the right to capture oil has been modified and protection against drainage by offset wells has been impaired, so that adjustments are rendered necessary and new remedies proper.** The provisions above referred to were recently considered by the Supreme Court of Texas in Brown v. Humble Oil Co., 83 S. W. (2d) 935, 944, 99 A. L. R. 1107, Id., 87 S. W. (2d) 1069, 101 A. L. R. 1393, and held valid.
>
> **"But an owner unable to protect himself from drainage by an offset well is given the right to petition the Commission and the Commission has power and a consequent duty to 'prevent injury to adjoining property,' and touching a common pool or portion of it to 'distribute, prorate or otherwise allocate the allowable production among the various producers.'"** (Emphasis ours.)

Railroad Commission v. Gulf Production Co., 134 Tex. 122, 132 S. W. (2d) 254, 255, held:

> " . . . . the facts of this record show, as a matter of law, that a third well on this tract would enable Tippett to recover more than his fair share of the oil and gas in or under his land, or their equivalents in kind. Under such a record, the granting of this permit to prevent confiscation was an abuse of power on the part of the Commission, and therefore unlawful."

Ownership in place is a rule of property in Texas. **Brown v. Humble Oil & Refining Co., supra.** By the conservation statutes and rules cross-petitioners are limited both in number of wells they may drill and the quantity of oil and gas they may produce, so that they may no longer fully fend for themselves; and because of this, proper provision must be made so that Burford and X Y Z Company may not take undue advantage of them. **Henderson v. Terrell,** (W. D. Tex., 1938) 24 F. Supp. 147, 152. The "Commission must be fair and must not indulge in unreasonable discrimination . . . between different tracts of land in the same field." **Gulf Land Co. v. Atlantic Refining Co.,** 134 Tex. 59, 131 S. W. (2d) 73, 85.

The State conservation statutes provide: " . . . the Commission shall distribute, prorate, or otherwise apportion or allocate, the allowable production among the various producers on a reasonable basis"; and impose upon the Commission the duty to "make and enforce rules, regulations, or orders . . . to require wells to be . . . operated in such manner as to prevent injury to adjoining property." (Acts 1935, 44th Leg., p. 180, ch. 76, Secs. 6 and 2; Ver. Tex. Stats. 1936, Art. 6049c, Sec. 7; Art. 6008, Sec. 6.)

The granting of four wells on the strip, without adjusting the allowable, has the effect of taking oil from cross-petitioners and giving it to Burford and X Y Z Company. This is confiscatory and discriminatory. **Consolidated Gas Utilities Corp. v. Thompson,** 14 F. Supp. 318, 328.

In the case at bar, the undisputed proof shows that defendants will receive all the oil they are entitled to, and more, through one well, and to grant four wells without adjusting the allowable will give them a

greatly increased advantage in drainage opportunity, resulting in great injury to cross-petitioners. Under this undisputed proof, it is really amazing that the Commission, having the duty to deal equitably with all parties before it, would do nothing whatever toward protecting cross-petitioners in this situation. By adjusting the allowable the Commission could have lessened or prevented the injury which cross-petitioners will otherwise suffer. The Commission granted this permit in the light of its existing proration order, giving each additional well 20 barrels daily, irrespective of density, acreage, or reserves in place. The granting of the permit in the light of that order, and without providing for an adjustment as expressly requested by cross-petitioners, is arbitrary, unreasonable, and discriminatory. It does not meet the test of fair dealing. The police power cannot be used as a tool of oppression for the purpose of benefiting one at the expense of another. This court should not countenance or uphold any purported exercise of police power which unnecessarily confiscates cross-petitioners' property for the benefit of petitioners. Since there was a way open to the Commission to accomplish any legitimate objective without enabling petitioners to drain and take an additional quantity of cross-petitioners' oil, the Commission's failure to follow such fair and open route exceeds the necessities of the case under any conceivable view of fairness and renders its order unjust and unreasonable, and denies cross-petitioners equal protection of law and deprives them of their property without due process of law, in violation of the Fourteenth

Amendment to the Constitution of the United States, and the law of Texas.

In an effort to protect their own property, cross-petitioners have made every conceivable reasonable offer under which the owners of the strip would get their share of the oil. Petitioners have shown no response. Surely the courts cannot close their eyes to this utter failure of the administrative body to deal fairly between competing operators, which plainly takes from one and bestows upon another.

VII.

It was the duty of the trial court and the Circuit Court of Appeals to apply the State law and grant cross-petitioners the relief they were entitled to thereunder, the federal court having jurisdiction both on grounds of diversity of citizenship and federal questions.

The trial court found that it has jurisdiction on grounds of diversity of citizenship and Federal questions involved. (R. 88, 2, 90) Of course, it is also a statutory suit under Section 8 of Article 6049c, footnote 1, **supra**, p. 3. (R. 34)

A citizen of another state may invoke the jurisdiction of the Federal court to defend his property against illegal acts of the State officers whenever a citizen of the State can go into the courts of the State and do so. **Reagan v. Farmer's Loan & Trust Co.**, 154 U. S. 362, 14 S. Ct. 1047, 1052. A Federal court sitting in Travis County is a "court of competent jurisdiction in Travis County" authorized by Texas statute to hear suits to set aside orders of the Railroad Com-

mission of Texas. **Reagan v. Farmer's Loan & Trust Co., supra; MacMillan v. Railroad Commission,** 51 Fed. (2d) 400, in which it appears at page 403 of the opinion that the suit was under the statute in oil and gas matters and wherein the court held, page 405, "As usurpations, under the authority of the statutes of Texas authorizing this suit, we strike them down."

In **Erie v. Tompkins,** 304 U. S. 64, 58 S. Ct. 817, headnote 2, this Court held, "In Federal courts, except in matters governed by Federal constitution or by acts of Congress, law to be applied in any case is law of the State."

This doctrine was applied by the Circuit Court of Appeals in **Gulf Land Co. v. Atlantic Refining Co.,** 113 Fed. (2d) 902 (CCA 5th), a case of similar nature.

Siler v. Louisville & N. R. Co., 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753, holds that the presence of a Federal question may also open up State issues for decision of the Federal court, even though diversity of citizenship is not involved.

The Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings in this: Under the established law of the State of Texas applied to the undisputed facts, the permit orders involved are void and cross-petitioners are entitled to judgment annulling them and ancillary injunctive relief. The trial court stated in the conclusions of law that it is of the opinion that "the various matters of state law raised present no Federal questions and furthermore present no matters of such merit as to warrant the issuance of an injunction"; and further suggested that, under its interpretation of this court's opinions in **Railroad Commission v. Rowan & Nichols Oil Co.,** 310 U. S. 573, 60 S. Ct. 1021,

and **Railroad Commission v. Rowan & Nichols Oil Co.,** 311 U. S. 570, 61 S. Ct. 343, the parties should be "relegated to the state courts" for determination of the matters of state law (R. 91-2); but the judgment of the trial court dismissed the complaints without reserving to cross-petitioners the right to present matters of state law to the state courts (R. 87); and in legal effect this is an adverse adjudication of such matters, under the state and federal decisions. 34 **C. J.** 788, Sec. 1206; **Jones v. City of Uvalde,** (Civ. App.) 144 S. W. (2d) 932 (writ refused); 26 **Tex. Jur.** 95, Sec. 397; **Baker v. Cummings,** 181 U. S. 117, 21 S. Ct. 578; **McWilliams v. Blackard,** (CCA 8) 96 F. (2d) 43; **Sacks v. Stecker,** (CCA 2) 62 F. (2d) 65, headnotes 8 and 9; **Wilson Cypress Co. v. Atlantic Coast Line R. Co.,** (CCA 5) 109 F. (2d) 623, 625; **Brooks v. Arkansas-Louisiana Pipe Line Co.,** (CCA 8) 77 F. (2d) 965, 968.

Although cross-petitioners requested the Circuit Court of Appeals to adjudicate the matters of state law and render judgment thereon for cross-petitioners, that court did not adjudicate such matters, nor determine whether they had been rightly or wrongly decided by the trial court. On the contrary, though recognizing the duty of the federal courts to apply the state law (**Erie R. Co. v. Tompkins, supra; Siler v. Louisville & N. R. Co., supra**) it reversed and remanded the case with instructions to the trial court to again adjudicate the matters of state law. (R. 436, 448, 481)

Cross-petitioners urge that under the usual and accepted procedure it was the duty of the Circuit Court of Appeals to adjudicate the matters of state law and itself render judgment thereon for cross-petitioners, the requisite facts being undisputed. The

Circuit Court of Appeals could determine such law questions as readily as the trial court, and by doing so additional delay and expense of litigation would be avoided. Having granting a writ of certiorari, this court may render the final decree which the Circuit Court of Appeals should have rendered, under authorities cited, **supra**, p. 2.

We understand petitioners' contention is that cross-petitioners have been accorded more relief by the Circuit Court of Appeals than they are entitled to under the Rowan & Nichols cases, and that of all decisions rendered herein, only that of the trial court correctly applied the principles announced by this court in those cases.

We submit to the contrary that the Rowan & Nichols cases clearly do not hold that the Federal courts shall refuse to adjudicate and apply matters of State law arising in cases where, as here, the State law on the particular point is not in doubt, but has been declared by the highest court of the State, and where such matters of state law arise on undisputed evidence, with respect to a quasi-judicial rather than a legislative determination of an administrative body, and the scope of the judicial inquiry into the validity of such quasi-judicial order allowed by the State statute has been definitely settled by the highest court of the State[6] to be an independent trial **de novo** rather than a mere limited review, and the Federal court has jurisdiction by reason of diversity of citizenship and Federal questions. Because those cases do not deny cross-petitioners' right to the relief they here

[6]Railroad Commission v. Shell Oil Co., 161 S. W. (2d) 1022; Cook Drilling Co. v. Gulf Oil Corp., 161 S. W. (2d) 1035. (Not yet officially reported)

seek of the Federal courts with respect to such matters of State law, we see no need to discuss the scope of their application to cases involving doubtful questions of State law, and questions of State policy on which the State courts have not written.

Extended application of a doctrine that the Federal courts will not adjudicate matters of State law arising in cases within the jurisdiction of the Federal courts would not only amount to a judicial abdication of a large part of the statutory jurisdiction of Federal courts, but the staying of the decision of Federal questions until matters of State law have been adjudicated by State courts would greatly delay the termination of litigation and greatly increase the expense thereof.

Even if the doctrine announced in the Rowan & Nichols cases applies to the very different situation presented in this case, it is clear the trial court did not relegate the matters of State law to the State courts for decisions, but proceeded to decide such questions, and in doing so failed to apply the State law. The trial court's judgment was a straight dismissal, and under the decisions above cited would be **res adjudicata** in case cross-petitioners now presented such questions of State law to the State courts by filing a new suit in the State court.

There is no merit in the contention in paragraph 3, page 11 of Petitioners' Brief, that the district court should not determine the validity of the order under the State law prior to determination of the validity of such order in the State courts, because if the State courts first adjudicated such questions of State law, the judgment of the State court would be **res adjudicata** against a second adjudication of such question by the Federal court; and because the judgment

rendered by the district court actually closed the door to an adjudication of the State law questions by the State court and rendered the latter impossible.

Of course, if this court should decide contrary to the holding of the Circuit Court of Appeals in its opinion of July 11, 1942, that the Federal courts are to decide the questions of State law involved in a case of this kind, then it follows that the trial court's judgment is erroneous by reason of having undertaken to make an adjudication of the merits, and for the additional reason that it incorrectly applied the applicable State law; and in the event of such a holding by this court the judgment of dismissal should be modified so that it would be without prejudice to the presentation of the State law questions to the State courts, as this court did with respect to its own judgment in the first Rowan & Nichols case.

VIII.

The Circuit Court of Appeals had jurisdiction to vacate or correct its original judgment and opinion in this case more than three months after the first petition for rehearing had been denied because the term of court at which judgment was rendered had not expired.

It is a universally recognized rule of law that "During the term in which a decree is entered, the court entering it may, in the exercise of its discretion, on motion for rehearing or otherwise, change, modify, or set aside its decree." **Obear-Nester Glass Co. v. Hartford-Empire Co.,** (CCA 8) 61 F. (2d) 31, 33. The jurisdiction of the Circuit Court of Appeals to grant

the second petition for rehearing and to vacate the judgment theretofore rendered is established by the following authorities: **Bassett v. United States,** (1869) 9 Wall. 38, 41, 19 L. Ed. 548; **Henderson v. Carbondale Co.,** 140 U. S. 25, 11 S. Ct. 691, 696; **Wichita Roy. Co. v. City Natl. Bank of Wichita Falls,** 97 F. (2d) 249, aff'd, 306 U. S. 103; **Bronson v. Schulten,** 104 U. S. 410, 26 L. Ed. 797; **Zimmern v. United States,** 298 U. S. 167, 80 L. Ed. 1118; **United States v. Benz,** 282 U. S. 304, 75 L. Ed. 354; **Ex parte Lange,** 85 U. S. 163, 18 Wall. 163, 21 L. Ed. 872; **Unitype Co. v. Long** (CCA 6) 149 F. 196; **Judson v. Gage,** (CCA 2) 98 F. 540, 543; **Mahler v. Animarium Co.,** (CCA 8) 129 F. 897; **Winslow v. Staab,** (CCA 2) 242 F. 426; **Greyerbiehl v. Hughes Elec. Co.,** (CCA 8) 294 F. 802, cert. den. 44 S. Ct. 402; **I. C. C. v. L. & N. R. Co.,** (U. S. C. C.) 101 F. 146; **Miocene Ditch Co. v. Moore** (CCA 9) 150 F. 483.

We also refer to 34 C. J. 207 and the many cases there cited.

The fact that the mandate had issued is immaterial because the appellate court may, before the expiration of its term, recall the mandate for the purpose of modifying, changing, or setting aside its decree. Rule 32 of the Circuit Court of Appeals; 5 C. J. S. 1561; **Bank v. Tennessee,** (1896) 163 U. S. 416, 16 S. Ct. 1113, 1117; **Thomsen v. Cayser,** (1916) 243 U. S. 66, 37 S. Ct. 353, headnote 1; **Clarke v. Boysen,** (CCA 8) 273 F. 923; **Wichita Roy. Co. v. City Natl. Bank of Wichita Falls, supra.**

Petitioners cite no cases in support of their contention that after the mandate has issued, it is too late to grant a rehearing even at the same term. In **Bank v. Tennessee, supra,** and **Thomsen v. Cayser, supra,** this court allowed a rehearing at the same term, even

though the mandate had been issued, the procedure being to recall and reform the mandate if a rehearing is granted after issuance of the mandate.

Petitioners question the duration of the term. It is sufficient that the Circuit Court of Appeals, which controls adjournment, found that the same term was in effect. (R. 430)

IX.

The Circuit Court of Appeals did not abuse its discretion in granting the second petition for rehearing because the law as announced in Selby Oil & Gas Co. v. Railroad Commission, 128 F. (2d) 334, after overruling the first petition for rehearing, was inconsistent with the law as announced and followed in rendering the original judgment in this case and justice required that the court conform its decision thereto.

There can be no doubt that the rules of law announced and applied by the Circuit Court of Appeals in reversing and remanding the judgment in **Selby Oil & Gas Company v. Railroad Commission**, 128 F. (2d) 334, would, if applied in the case at bar, have necessarily resulted in reversal of the judgment rendered in this case by the District Court and either rendition of judgment for cross-petitioners, or remand of the case for another trial.

The second petition for rehearing was based upon the contrary holding of the same court in the Selby case, made at the same term, but subsequent to the filing and overruling of the original petition for rehearing in this cause. Obviously, the contrary holding of the Selby case could not have been asserted in the original petition for rehearing. The second pe-

tition, therefore, presented a new and unusual situation, calculated to appeal to the purpose of the court to render even justice by applying the same rule of law to all occupying the same position. **Unitype Co. v. Long, supra.**

The decision cited by petitioners construing District Court Rule 59(b) is not applicable here by analogy, in that the Circuit Court of Appeals has no such rule, and the purposes served by the District Court rule are not apposite here.

Having the undoubted right during the same term to correct the manifest injustice of the judgment it had rendered, we submit that there can be no question as to abuse of discretion in doing so.

X.

In the event of a remand, the trial court should independently determine any disputed fact issue in testing the validity of the permit orders involved, as required by the State law.

In this connection we make two contentions:

First, that it was incumbent on the United States District Court in this case to follow the requirements of the "appeal statute"[7] as construed by the highest court of Texas as to the extent of judicial review thereunder.

Second, the statute giving the right of appeal to the Courts to determine the validity of this administrative order has been construed by the highest court of Texas as requiring that the Court hear evidence and make its independent determination of

[7]Art. 6049 c, Sec. 8, quoted in footnote 1, supra p. 3.

all fact issues and its independent determination as to whether the order should be adjudged invalid in the light of its findings.

A.

In support of the first contention we submit:

1. As held in **Erie Railroad Company v. Tompkins,** 304 U. S. 64, 69, the Federal Courts will administer the law as determined by the highest court of the State.

2. This is a statutory appeal from an order of the Railroad Commission (a trial de novo) of which the state courts and the United States District Court in Travis County have concurrent jurisdiction; the latter court entertaining such an appeal is bound equally with the state courts to follow the statute as interpreted by the highest court in Texas in ascertaining the relevant facts and passing on the validity of the order.

In this connection we call special attention to the opinion of the Commission of Appeals of Texas which was adopted as the opinion of the Supreme Court in **Alpha Pet. Co. v. Terrell,** 122 Texas 257, 59 S. W. (2d) 364. That case involved the question as to whether the Legislature could reduce the constitutional jurisdiction of the various district courts of Texas by the provision in the same appeal statute that is here involved that appeals thereunder shall be brought in a court in Travis County.

The Supreme Court held that such suits **are actions to enforce a right that exists only by operation of the statute and not under the Constitution or the common law** and therefore the Legislature, in spite

of the constitutional provisions as to general jurisdiction of the various district courts, could limit the venue to Travis County.

That being true, it must be admitted that the provisions of the statute as to the extent of judicial review thereunder are an essential part of the act creating the right of appeal; that they are descriptive of the right that is given; **that no court should entertain such an appeal, but substantially change its nature.**

In this connection we refer to **Reagan vs. Farmers Loan & Trust Co.**, 154 U. S. 362; **MacMillan v. R. R. Com. of Texas** (D. C.), 51 Fed. (2d) 400; **Gulf Land Co. v. Atlantic Ref. Co.** (CCA 5) 113 Fed. (2d) 902; **Selby Oil & Gas Co. v. Railroad Commission, supra.**

Since this appeal statute was originally enacted in 1931 and later amended in 1935 (Acts 1931, 1st C. S. p. 46; Acts 1935, Reg. Ses. p. 180) long after this Court held in **Reagan v. Farmers Loan and Trust Co.**, 154 U. S. 362, that a similarly worded Texas statute conferred jurisdiction on the Federal Court in Travis County, it must be assumed that the Legislature intended that this special appeal might be entertained by the Federal as well as by a state court in that county.

The Circuit Court of Appeals in its second opinion in the case at bar stated that this is not a constitutional suit and also a statutory suit as was held in the Selby case, but one suit of an equitable nature.

But the Texas Court of Civil Appeals in **Empire Gas & Fuel Co. v. R. R. Com.**, 94 S. W. (2d) 1240, 1244,

which was approved by the Supreme Court of Texas by refusing a writ of error said:

> "Nor did appellant abandon its cause of action by announcing in open court that it abandoned its prayer for injunctive relief against the drilling of said well No. 2 on said 2 3/4 acre tract and the production of oil from same. The issue of the validity of the Commission's order granting the permit still remained. The injunctive relief sought was but ancillary to, and dependent upon, the determination of that issue."

To the same effect is **Davenport v. Railroad Commission,** 89 S. W. (2d) 1006, 1007, subdivision one. (Writ of error dismissed)

In connection with the suggestions in the second opinion of the Circuit Court of Appeals that the appeal statute is not binding on the District Courts of the United States, we refer to **Cox v. Hart,** 145 U. S. 376, 384, holding that statutory provisions as to trial of a trespass to try title case will be followed by the Federal Courts; also to similar holdings in **Travelers Ins. Co. v. Burden,** (CCA 5) 94 Fed. (2d) 880; **Great American Ind. Co. v. Dominguez,** (CCA 5) 84 Fed. (2d) 179, and **Heard v. Texas Compensation Ins. Co.,** (CCA 5) 87 Fed. (2d) 30, 32, all workmen's compensation cases. In the Heard case, 87 Fed. (2d) 32, the Court said:

> "It is settled law that the remedy afforded by the Texas Workmen's Compensation Statutes is exclusive; that the jurisdiction of the District Court is a special jurisdiction and that in a Workmen's compensation case every step provided in the statutes must be taken as there prescribed.

Mingus v. Wadley, 115 Tex. 551, 285 S. W. 1084; Oilmen's Reciprocal v. Franklin, 116 Tex. 59, 286 S. W. 195; Federal Surety Co. v. Jetton (Tex. Com. App.) 44 S. W. (2d) 923."

The Supreme Court of Texas held in **Mingus v. Wadley,** 115 Tex. 551, that suits arising under the workmen's compensation law are in derogation of the common law and that the rights to be enforced and remedies provided are purely statutory.

We cannot understand why the Federal Courts trying a Workmen's Compensation case should follow the state statute and not do so in trying a statutory appeal from a Commission order.

3. The statute providing for appeals to the courts to test the validity of Railroad Commission orders was an essential part of and evidently a condition precedent to the continued exercise by the Railroad Commission of the power to control the drilling and operation of oil wells in Texas and should be construed as a limitation upon the power and inseparably connected therewith.

Each time the Legislature of Texas has conferred power on the Railroad Commission to make orders, rules or regulations in relation to any matter it has provided contemporaneously or later for a statutory appeal to the Courts with authority to hear evidence bearing on the justification therefor and to declare them void.

The present statutory provisions for appeal from orders of the Railroad Commission in railroad matters, gas utility matters and motor bus permits matters are, respectively, Article 6453, Article 5069, and Article 911-A, section 17 of the 1936 Vernon's Texas Statutes.

The jurisdiction granted to the Railroad Commission first for the regulation of railroads and later of the oil and gas industries of the State is one which, if abused, or unfairly administered could result in confiscation and destruction of property rights of inestimable value. The Legislature was so convinced of the necessity for some competent and really effective supervision over the acts of the Commission that it was not content with the general legal and equitable powers of the courts, but created in connection with each delegation of power a special action or appeal.

We submit that these provisions for the special character of appeal are an essential part of each grant of power and cannot be divorced therefrom; that if the special type of appeal fails, the delegation of power must likewise fail.

4. Rule 37, prohibiting closer spacing of oil wells than 330-660 feet, unless special permit is granted by the Railroad Commission after a hearing and pursuant to finding that an exception is necessary to prevent confiscation or to prevent waste, has repeatedly been held to be a valid exercise of the police power and justified as necessary to prevent waste of the natural resources of the state.

Mr. Burford, having sought to take advantage of the provision of this relating to exceptions is in no position to ask the courts of the United States to destroy the essential requirement that the validity of all such exception orders be passed on by the courts in the light of their independent judicial determination of the facts and law.

In **Brown v. Humble Oil & Refining Co.**, 126 Texas 296, 314, 83 S. W. (2d) 935, 945, the Supreme Court said:

> "The application was made to the Railroad Commission for a permit to drill a well on the 1½ acres under the terms of rule 37. The rights granted are by virtue of the exceptions contained in the rule. **That being true, plaintiffs in error are not now in position to attack the validity of the provision of the rule under which they received and now hold their benefits.** Baker v. Coman, 109 Tex. 85, 198 S. W. 141." (Emphasis ours)

We also refer to **Turnbow v. Barnsdall Oil Co.**, 99 S. W. (2d) 1096, 1098, stating:

> * * * "It is also settled that one who claims rights under a rule of the commission cannot assert the invalidity of the rule under which the rights he claims arise, as Turnbow seeks to do."

The Supreme Court, by refusing writ of error in this case, approved this statement of the law.

Equally, the Railroad Commission, deriving all its power from the statutes enacted by the Legislature, is precluded from insisting that it is not bound by the provisions of the statute governing the right and extent of appeal from its orders.

5. The judgments recently rendered by United States Courts upholding administrative orders against constitutional objections because such orders are supported by substantial evidence are in the nature of concessions to the legislative authority that created the administrative bodies. Presumably, in those cases, the authority desired that the attack on the orders of its administrative bodies be so limited.

The State of Texas has by statute as construed by its highest court declared that it desires no such con-

cession and announced the public policy of the State as requiring independent judicial determination by the Court of the facts in this type of case and of the judgment that is required by its findings.

The Federal Government and its courts have no interest in forcing a state to unwillingly accept a limited and ineffectual examination of the validity of orders made by its administrative bodies.

So, logically, a state can prescribe a broader type of appeal, and this requirement should be respected by all courts that acquire jurisdiction. It is in the nature of a refusal to accept an offer to the state to give its agencies immunity from effective supervision by the courts.

In **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U. S. 570, 576, this Court said:

> "The Constitution does not provide that the federal courts shall strike a balance between ascertainable facts and dubious inferences underlying such a complicated and elusive situation as is presented by the Texas oil fields in order to substitute the court's wisdom for that of the legislative body."

At that time the Supreme Court of Texas had not, as it has now, construed the Texas statute as requiring that the courts, in the statutory appeal from an order granting a drilling permit, should make their independent determination of all fact issues and also of the wisdom of the order in the light thereof.

We submit therefore that the "substantial evidence" rule has no application even to the determination as to whether the order here attacked has denied to

cross-petitioners any rights under the Fourteenth Amendment to the Constitution of the United States.

B.

In support of the second contention we submit:

In **Railroad Commission v. Shell Oil Co.**, 161 S. W. (2d) 1022, 1028, the Supreme Court of Texas used the following language:

> **"The doctrine that the administrative agency should take the testimony and make the findings of fact, and that the findings should be binding upon the court, is foreign to the law of this state.** We have found no Texas decision involving review of the orders of an administrative body which so restricts the court in its taking of testimony. Such doctrine seems to have had its origin in the statutory enactments by the Congress of the United States. These statutes usually provide: 'The findings of the Board (or Commission) as to the facts, if supported by evidence, shall be conclusive.' Mr. Stason in his article in 89 Pennsylvania Law Review, p. 1026, lists nineteen such statutes so enacted by the Congress of the United States. In some of these Congress has gone so far as to provide that the review of the ruling of the Board shall not be by a trial court, but shall be by the Circuit Court of Appeals. In this connection, see the National Labor Relations Act, 29 U. S. C. A., Sec. 160(f).
>
> "Our State Constitution contains the following pertinent provision: 'Article II, Section 1. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are Legislative to one; those which are Executive to another,

and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.' * * * **The taking of the testimony, including the determination of what evidence shall be admitted and what shall be rejected, and the weight to be given thereto, is an important feature of a trial. It often requires a knowledge of the substantive law as well as the application of the rules of evidence. A lay agency, unfamiliar with these principles, might reject material evidence and admit and rely on other evidence that was inadmissible. No system has been provided in this State for reviewing the action of the administrative agency for procedural errors committed in the taking of the testimony, nor for remanding the cause to the agency for a rehearing because thereof. It would indeed be a sorry trial if an agency could thus reject the material evidence of one side and admit and consider the evidence offered by the other, and bind the court as to the facts by the findings made at such a hearing.** In this connection, Chief Justice Hughes in an address before the Federal Bar Association, in 1931, said: 'The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say, "Let me find the facts for the people of my country, and I care little who lays down the general principles".'

"In the light of the foregoing constitutional provision, it may well be doubted whether the Legislature of this State would have the authority to transfer from the judicial branch of the government to the administrative branch thereof such an essential part of the trial of a lawsuit as the

taking of the testimony and the determination of the facts. But we need not here theorize on that question. **It is sufficient to say that the Legislature of this State has not undertaken to do so in this instance.** The Act here in question provides for a testing of such orders in the district court in the following language:

"'Sec. 8. Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid. (As amended, Acts 1932, 42nd Leg., 4th C. S., p. 3, ch. 2, Sec. 8; Acts 1935, 44th Leg. p. 180, ch. 76, Sec. 14).' Vernon's Ann. Civ. St. Art. 6049c, Sec. 8. **It will be noted that the above statute refers to the action as a 'suit.' It further provides that, 'In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order.' A trial generally includes a judicial examination of the issues between the parties, whether of law or of fact.** 42 Words and Phrases, Perm. Ed., p. 481. Moreover, there would have been no necessity for the placing of the bur-

den of proof if proof was not to be heard. The Act in question clearly contemplates that the evidence shall be taken anew in the district court.

"Much of the confusion that exists concerning the effect to be given to the so-called findings of fact by an administrative agency, upon a contest of an order of such agency in court, arises from the failure to take into consideration the kind of order issued by the agency, and the character of contest that is being made thereon. As above indicated, our statutes do not provide for the making of any findings of fact by an administrative agency. Nevertheless, when the validity of an order of such an agency is contested in court, certain presumptions are indulged in favor of the validity of such order in some instances. If the matter covered by the order is one committed to the agency by the Legislature, and involves the exercise of its sound judgment and discretion in the administration of the matter so committed to it, the court will not undertake to put itself in the position of the agency, and determine the wisdom or advisability of the particular ruling or order in question, but will sustain the action of the agency so long as its conclusions are reasonably supported by substantial evidence. This is so because, since the Legislature has seen fit to vest the authority to exercise sound judgment and discretion in the particular matter in the administrative agency, courts will not undertake to usurp the powers committed to the agency, and to exercise the agency's judgment and discretion for it. For example, in contesting an order of a commissioners' court fixing a tax rate, or an order of a school board concerning the management of schools, the court will not put itself in the position of the administrative agency for the purpose of determining whether or not the action was wise. Wright v. Allen, Tex. Civ. App.,

257 S. W. 980, par. 4, writ refused; Young County Board of School Trustees v. Bailey, Tex. Civ. App., 61 S. W. (2d) 130, par. 2, writ refused. In such a case the issue is not whether or not the agency came to the proper fact conclusion on the basis of conflicting evidence, but whether or not it acted arbitrarily and without regard to the facts. Hence it is generally recognized that where the order of the agency under attack involves the exercise of the sound judgment and discretion of the agency in a matter committed to it by the Legislature, the court will sustain the order if the action of the agency in reaching such conclusion is reasonably supported by substantial evidence. This does not mean that a mere scintilla of evidence will suffice, **nor does it mean that the court is bound to select the testimony of one side, with absolute blindness to that introduced by the other. After all, the court is to render justice in the case. The record is to be considered as a whole, and it is for the court to determine what constitutes substantial evidence.** The court is not to substitute its discretion for that committed to the agency by the Legislature, but is to sustain the agency if it is reasonably supported by substantial evidence before the court. If the evidence **as a whole** is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action, then the order must be set aside.

"On the other hand, of course, if the purported order, rule, or regulation of the agency undertakes to cover a matter not committed by the Legislature to the judgment and discretion of the agency, or if the statute, like Article 6059, construed by this Court in Lone Star Gas Co. v. State of Texas, Tex. Sup., 153 S. W. (2d) 681, provides otherwise, **the substantial evidence rule hereinabove announced does not apply.**

"The fact, however, that in some instances the action of the agency is to be sustained, if it is reasonably supported by substantial evidence, does not militate against the hearing of the evidence anew in the trial court. In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same. Whether the agency heard sufficient evidence is not material. In fact, the evidence heard by the agency is not per se admissible upon the trial in the district court. Whether it is admissible upon the trial in the district court must depend upon its own merits under the general rules of evidence, and without regard to whether it had theretofore been introduced before the agency." (Emphasis ours)

The highest court in Texas has thus held that appeals from orders, rules and regulations of the Railroad Commission are to be divided, in respect to the scope of judicial review, into two classes, first, those as to matters as to which the Railroad Commission is authorized to exercise its discretion; in which the appeal is to be on the "reasonable minds might differ" rule, and second, those as to matters that do not involve such discretion and those in which the statute provides for a broader appeal. We submit that the case at bar comes within both branches of the second classification. After quoting the appeal statute, the Supreme Court, in the Shell case, 161 S. W. (2d) 1029) used this significant language:

" * * * It will be noted that the above statute refers to the action as a 'suit.' It further pro-

> **vides that, 'In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order.' A trial generally includes a judicial examination of the issues between the parties, whether of law or of fact.** 42 Words and Phrases, Perm. Ed., p. 481." (Emphasis ours)

We further insist that the instant case comes within the second class because the Railroad Commission had no discretion to grant or refuse the Rule 37 exceptions that were applied for by Mr. Burford. The application must be decided according to the existing facts.

Rule 37 provides for exceptions only after the Commission, pursuant to a public hearing, has determined that the well desired is necessary either to prevent waste or to prevent confiscation. (Rec. 133) Clearly this rule is binding on the Commission and precludes it from granting such a permit except pursuant to a bona fide and honest finding that it is necessary either to prevent confiscation or to prevent waste.

In passing on a similar question the Supreme Court, in **Brown v. Humble Oil & Refining Co.**, 126 Tex. 296, 314, 83 S. W. (2d) 935, 945, said:

> "The decisions of the Railroad Commission on this question must be based upon proof, and **must not be capricious or unreasonable. The mere holding of a hearing does not justify its action. If after a hearing the commission acts without regard to the evidence,** or makes a ruling wholly unsupported by the evidence, it cannot be said to have exercised its discretion. And where it is shown that the commission has abused its discretion, or has acted illegally and issued a permit in violation of its rules, the courts are fully authorized to nullify the permit of the commission

and prevent its enforcement. Shupee v. Railroad Commission, 123 Tex. 521, 73 S. W. (2d) 505; 42 Corpus Juris, pp. 691, 692." (Emphasis ours)

While the author of that opinion used the word "discretion" in this connection, it is evident that the court did not thereby hold that the Commission had discretion to grant or refuse a permit on a given state of facts. This is evident because the Court says in effect that if "the Commission acts without regard to the evidence" the permit cannot be upheld.

Also because the Court, in **Gulf Land Company v. Atlantic Ref. Co.**, 134 Tex. 59, 72, 131 S. W. (2d) 73, 81, a statutory appeal from a well permit order, said:

> "* * * **In ascertaining and making fact findings the Commission exercises quasi judicial powers. It should therefore always approach each case with a judicial bearing, with but one purpose and aim in view, and that to make a fair finding.**" (Emphasis ours)

This conclusion is fortified by the holding in the Shell case under discussion (161 S. W. (2d) 1030) that the evidence heard by the Railroad Commission is not per se admissible on the trial in the District Court; and by the holding of the Supreme Court in **Cook Drilling Co. v. Gulf Oil Corporation,** 161 S. W. (2d) 1035, 1036, in which the Court used the following language:

> "The trial contemplated by the Act in question is not for the purpose of determining whether the Commission actually heard sufficient evidence to

support its order, but whether there then existed sufficient facts to justify the entry thereof. Since there is to be a full hearing of the facts in the district court, whether the Commission actually heard sufficient evidence to sustain the order is not material. As is well known, hearings before the Commission are informal. In the vast majority of instances its orders are not contested. It would be placing a useless and intolerable burden on the Commission to require it to make an 'appeal-proof' record in every instance. **The rights of the parties will be fully protected if, upon a contest of the order in the district court, the parties are given full opportunity to show that at the time the order was entered there did, or did not, then exist sufficient facts to justify the entry of the same."** (Emphasis ours)

The trial Court was thus directed to make its own decision as to the facts and also as to whether they justified the entry of the order.

Significantly the Court in the Cook case did not instruct the trial Court to ascertain whether "the evidence as a whole is such that reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its order."

The latter is the test prescribed in the Shell case (161 S. W. (2d) 1022) for review of orders in matters involving discretion; it is conspicuously absent from the opinion in the Cook Drilling Company case.

As the latter was a Rule 37 case, the opinion, in effect, declares that the Commission has no discretion to grant or refuse such a permit; and therefore that the substantial evidence rule does not apply.

It is true that the Supreme Court in the Cook Drilling Company case held that it is not material whether the Commission actually heard sufficient evidence to sustain the order in a Rule 37 permit appeal.

While this modifies to some extent the pronouncement made in the Brown case above quoted, (126 Texas 314) it would seem to preclude an appeal from such an order on any character of substantial evidence or "reasonable minds might differ" rule.

An application for an exception to Rule 37 which is improperly granted or improperly refused will surely result in confiscation of property. The Commission can grant or refuse such an application without hearing any evidence at all as to its propriety. Surely a rule that such an order must be sustained if the evidence on the trial de novo is such that reasonable minds might differ as to its validity, would be a poor substitute for the type of appeal that is provided by the Texas statute.

CONCLUSION

We submit that portion of the judgment of the Circuit Court of Appeals which remands the case should be set aside and judgment should be rendered for cross-petitioners on the undisputed evidence. If this contention be overruled, then we submit the court should affirm the judgment of the Circuit Court of Appeals reversing that of the trial court and remanding the cause for new trial; and the district court should be instructed to make an independent deter-

mination of any disputed fact issues, in testing the reasonableness and validity of the permit orders involved, as required by the State law.

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FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,
Petitioners,

v.

SUN OIL COMPANY, ET AL.

No. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

v.

G. E. BURFORD, ET AL.

REPLY TO THE DISCUSSION OF QUESTIONS SUBMITTED BY THIS COURT FILED HEREIN BY THE ATTORNEYS FOR THE RAILROAD COMMISSION AND G. E. BURFORD

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PRESS OF VON BOECKMANN-JONES CO. AUSTIN, TEXAS

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I

It is insisted that the litigation authorized by Section 8 of Article 6049c, Vernon's Texas Civil Statutes, is not an actual "case or controversy" within the meaning of Article III of the Constitution of the United States, because it does not in-

volve the legal contentions of parties who have adverse legal interests.

Spear vs. Humble O. & Refining Co., 139 S. W. (2d) 212, and *Railroad Commission vs. Shell Oil Company*, 165 S. W. (2d) 503 (error refused) are cited in support of the statement that "a 'dissatisfied interested person' seeking a judicial determination of the validity of an order of the Texas Railroad Commission need show no injury under the Texas law".

We submit that two cases cited make no such holding.

In the *Spear* case the discussion of this question was as follows:

> "In this connection, the majority do not sustain the remaining contention of appellant raising the question that it was necessary for appellee to allege that it would not be able during the producing life of the field and the wells on its tract to recover through such wells the amount of oil equivalent to the amount of oil beneath such tracts; **nor to show injury to its private property rights sufficient to call for the intervention of the court of equity.** It is the majority view that this question has been raised in numerous cases and that **it has been overruled by the court; and that the Supreme Court has dismissed and refused writs of error in such cases; and deem the matter as being foreclosed by such decisions.** The writer's view on the matter is set forth in the above discussion of the correlative right of the parties."

The Supreme Court did not refuse the application for writ of error in this case, but dismissed it,

which, under the terms of Article 1728 of the Texas statutes then in force, meant that the Supreme Court held that the judgment of the Court of Civil Appeals was a correct one, but that it was not satisfied that the opinion of said court in all respects has correctly declared the law.

The opinion in *Railroad Commission vs. Shell*, 165 S. W. (2d) 503, also fails to support the contention made by these attorneys. After stating that the appellants contended that it was not shown that the two wells would actually drain any oil from the Shell lease, the Court made the following statement:

> * * * "The Shell lease abutted the 6.07 a. tract on the west, and Shell was a party to the proceeding before the Commission. **Under repeated decisions it was an interested party, within our conservation statutes (Vernon's Ann. Civ. St. art. 6049c) and rules of the Commission, and was entitled to maintain the suit.** Empire Gas & Fuel Co. v. Railroad Comm., Tex. Civ. App., 94 S. W. (2d) 1240, error refused; Railroad Comm. v. Gulf Production Co., Tex. Civ. App., 115 S. W. (2d) 505, affirmed 134 Tex. 122, 132 S. W. (2d) 254; Stanolind Oil & Gas Co. v. Midas Oil Co., Tex. Civ. App., 123 S. W. (2d) 911 error dismissed."

In *Empire Gas & Fuel Co. vs. Railroad Commission*, 94 S. W. (2d) 1240 (error refused), the first case cited in said Shell case, the Court of Civil Appeals said:

> "The statute (article 6049c, Vernon's Ann. Civ. St.) does not define who are 'interested parties affected' by orders granting exceptions to rule 37, but does authorize such interested

parties so affected to attack such orders by suit. Obviously such a definition, if attempted by the Legislature, would not be practicable. Whether such exception 'affects' the interest or property rights of a leaseholder who attacks it **is generally a fact question dependent upon the facts and circumstances of the particular case,** and no hard and fast rule could well be laid down. **We do not think the statute contemplated the inclusion within its terms of those only remotely interested and affected by such order; but does include those whose lands and property rights are materially and substantially affected by such exception,** though their lands may not immediately adjoin the tract involved. Undoubtedly the well in question did substantially affect the 6 3/4 acres, the south boundary line of which was 430 feet (less than the 660 spacing distance for wells in this area) from the Gulf Production Company's lease. And the density of the drilling in the immediate area of this 6 3/4 acre tract was clearly of such consequence as to affect the Gulf's lease to the south thereof and adjacent to the 40-acre lease of the appellant out of which it was carved. The Gulf offered testimony of R. D. Parker, which was excluded, that if said well were drilled and offsets permitted, a further density of drilling would result in this area which would not only cause waste, but would materially drain oil from the Gulf's lease. Under all the facts and circumstances, therefore, we conclude that the Gulf showed such an interest in the suit as to make it a proper, if not a necessary, party, entitling it to intervene to protect its interests; and that the trial court erred in dismissing it from the suit."

In *Railroad Commission vs. Gulf Production Com-*

pany, 115 S. W. (2d) 505, affirmed in 134 Tex. 122, 132 S. W. (2d) 254, the second case cited in said Shell case, the court used the following language:

> "The Railroad Commission also contends that appellee, Gulf Production Company, did not show itself to be 'an interested person affected by' the permit here involved, within the meaning of the amended statute, article 6049c, section 8, Vernon's Ann. Civ. St., authorizing it to attack the permit. This contention is not sustained. Of the two wells on Tippett's tract, one was 50 feet and the other 87.5 feet from the line of the Gulf's lease. Whereas, of the two wells on the Gulf lease, south of these two wells, one was 183 feet and the other 141 feet from Tippett's line, thus giving Tippett a clear drainage advantage on that side of his tract. The third well granted thereon was located 87.5 feet from the Gulf's line, thus increasing the drainage from the Gulf lease. Manifestly, the Gulf was affected by such permit within the meaning of the statute. Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S. W. (2d) 1240, writ refused; Murphy v. Turman Oil Co., Tex. Civ. App., 97 S. W. (2d) 485, writ refused 300 U. S. 685, 57 S. Ct. 752, 81 L. Ed. 887."

In *Stanolind Oil & Gas Company vs. Midas Oil Co.,* 123 S. W. (2d) 911, the other case so cited, it was contended that the assignee of a lease adjacent to that upon which permit was granted was not authorized to maintain a suit to cancel the permit. Discussing this question, the court said:

> "That is the term the Legislature did use in Sec. 8 of Art. 6049c. Not only is this true,

but there is a manifest difference between the subject-matter of Art. 8307 and that of Art. 6049c. In the former, the rights granted to the employee for compensation are personal to him. Whereas, under Art. 6049c the rights involved, and subject to suit in an attack upon the Commission's order, are not personal, **but the suit so authorized is for the protection of the adjacent properties against drainage, confiscation, or damage, irrespective of ownership.** The mere fact that the ownership of such property changes hands after the hearing before the Commission has no bearing whatever on the **character, extent, or nature of the injuries, if any, which result thereto by virtue of the Commission's order. These are the matters which the Legislature intended to protect,** and the ownership thereof whether acquired before or after the Commission's order is made, is, we think, but incidental so long as the owner of the property affected seasonably acts under the statute. We conclude, therefore, that the District Court had jurisdiction to try these issues in the suit brought by the Stanolind Oil Company."

The oil and gas conservation statutes and rules promulgated pursuant thereto have sought to limit the number of wells that can be drilled in the oil fields of Texas for the purpose of preventing waste. Their validity has been sustained as being calculated to promote that object.

If it is desirable that wells in the East Texas oil field be drilled, in the absence of special circumstances, 660 feet from each other, each operator in the field has a direct personal interest in restricting the drilling in the neighborhood of his land

to the pattern that is applicable to his own land or to as close an approximation thereof as is possible.

The statements made in the cases cited by Petitioners, when considered in connection with the quotations made above, clearly show that the purpose of the appeal statute here involved was to permit an operator to protect his property from the injurious effects of special permits granted on adjacent land, and not authorized by Rule 37 under the facts existing at the time.

The contention that the statutory appeal under Section 8 of Article 6049c, Vernon's Texas Civil Statutes, provides for determination of abstract questions between parties who have no adverse legal interests, would seem to be conclusively answered by the fact that Rule 37, equivalent to a statute (*Sun Oil Company vs. Railroad Commission*, 68 S. W. (2d) 609, affirmed by the Supreme Court in *Bennett vs. Sun*, 125 Texas 540), as originally adopted, prohibits the drilling of any well closer than 150 feet to the lease boundary line, and, as amended, closer than 660 feet thereto without a special permit. The cancellation of a permit order based on the holding that the facts existing at the time it was granted did not justify it, necessarily renders the permit null from its date, and causes the immediate closing of the well and stoppage of production therefrom.

This follows from the general provisions of Rule 37, requiring a special permit, and also from the specific provision as follows:

"No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule, and no well drilled under such a special permit which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas; and any such well so drilled in violation of said rule or in violation of a permit granted as a special exception to said rule shall be plugged." (Alleged in paragraph 4 of the amended Bill of Complaint of the Sun Oil Company and admitted by the Commission and the XYZ Company,—Rec. 7, 51, 72)

Even if the law did not require immediate stoppage of production from wells, the permits for which have been cancelled, the substantial nature of the controversy involved in this case is evident when it is considered that an ancillary injunction to prevent further production from the well is prayed for and will undoubtedly be included in any final judgment cancelling the permit.

It is contended that the substantive right of an adjacent operator to protect himself is found in his right to apply to the Railroad Commission for an exception to drill an offset well or wells on his land, and that the right given him to appeal to the courts and test the validity of the order granting the exception to his neighbor does not confer upon him a substantive right by way of protection of his property, but merely gives him the opportunity to secure an academic statement from the court as to the validity of the permit he attacks.

Even if the numerous adjudicated cases in which oil operators have secured final judgments cancel-

ling permits and closing wells were not a sufficient answer to this argument, it is conclusively refuted by the following statement of the Supreme Court in *Railroad Commission vs. Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, 1027:

> "The Attorney General contends that since none of those now contesting the granting of the permit in question have applied for and been refused a like special permit, we have no ground to assume that such a permit would be refused if requested, and, consequently, there is no evidence of discrimination against them and they are not in a position to complain. However, in our opinion, the adoption and retention of the general provisions of Rule 37 requiring all operators in the East Texas oil field to space their wells at least 660 feet apart is in itself a denial of closer spacing to every operator in the field. In addition, the Act here in question specifically provides that any interested party may contest the granting of such a permit. It has frequently been held that adjoining landowners such as the present protestants are interested within the meaning of the statute. Humble Oil & Refining Co. v. Railroad Commission, Tex. Civ. App., 112 S. W. (2d) 222, par. 7; Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S. W. (2d) 1240, par. 12, writ refused; Murphy v. Turman Oil Co., Tex. Civ. App., 97 S. W. (2d) 485, par. 2."

In this connection we call attention to the fact that Rule 37 provides that "such exception shall be granted only after at least 10 days notice to all adjacent lessees affected thereby has been given", and by the fact shown by the undisputed evidence

that the Sun Oil Company and the Magnolia Petroleum Company were given notice of the hearing held by the Railroad Commission on the application involved in this case.

We also refer to the decisions in *Shell Pet. Corp. vs. R. R. Com.*, 133 S. W. (2d) 194, 196 (error refused) and *R. R. Com. vs. Shell Oil Co.*, 165 S. W. (2d) 503, 504, to the effect that the Railroad Commission cannot grant a well permit order in relation to the necessities of a tract unless all operators of land adjacent thereto who are interested parties have been given the notice provided by Rule 37.

Petitioners insist that the holding in *Magnolia vs. Edgar*, 62 S. W. (2d) 259, to the effect that the Railroad Commission is the only necessary party defendant in such suits shows that it is not an adversary proceeding and therefore not such a "case or controversy". A reference to the Edgar case just cited will show that the holding was that the **Railroad Commission represented all parties at interest including the permittee and that the case could therefore proceed against it alone.**

While this holding does not in the slightest degree indicate that such a case is not an adversary proceeding in which valuable property rights are definitely and finally adjudicated, the holding made therein should be considered in connection with the following cases indicating that the permittee is a necessary party: *Railroad Commission vs. Rau*, 45 S. W. (2d) 413, 416; *North Texas Coach vs. Marten*, 92 S. W. (2d) 263, 265; *Turman Oil Co. vs. Roberts*, 96 S. W. (2d) 724, 726; *Reynolds vs. Ward Oil Corp.*,

157 S. W. (2d) 457, 459; *T. & N. O. vs. Greer,* 117 S. W. (2d) 148.

The contention that this is not an adversary proceeding because the Railroad Commission may be the only necessary party thereto, is effectively answered by the fact that it is the duty of the Commission, as held in the *Edgar* case, to represent all parties interested in the maintenance of the validity of the permit. The character of the resistance offered by the Commission, represented by the Attorney General in the case at bar, would seem to show that the Magnolia Petroleum Company and the Sun Oil Company would not lack an adversary even if the permittee were not in court. As it is in court, the contention seems to lack merit.

The question as to whether this proceeding will settle the property rights of the parties depends, not on the law as to who are necessary parties, but on the effect of the judgment that will be rendered in favor of a successful plaintiff or a successful defendant.

Petitioners further insist that this Texas appeal statute does not provide a new substantive right but a mere procedural remedy. We submit that this argument is completely refuted by the following statement in *Gulf Land Company vs. Atlantic Refining Company,* 134 Tex. 59, 131 S. W. (2d) 73, 81-82:

> * * * "The action provided by statute for an appeal to a district court of Travis County to review the rules and orders of the Commission is clearly not an ordinary civil action. **To the**

contrary, it is a special statutory action to enforce a right which exists only by statute, and not under the Constitution or at common law. Alpha Petroleum Co. v. Terrell, 122 Tex. 257, 59 S. W. (2d) 364; Id., 122 Tex. 257, 59 S. W. (2d) 372."

We also refer to *Alpha Petroleum Company vs. Terrell*, 59 S. W (2d) 364 (opinion adopted by the Supreme Court), in which the Court held that the statutory appeal here involved confers upon the plaintiff a right he did not theretofore have; that prior thereto his right to annul a rule or order of the Commission depended upon a showing that it was utterly void on its face. The Court held that if the suit had been one to enforce a right existing under the Constitution or the common law, the Legislature could not have taken away the constitutional jurisdiction of the various district courts of Texas, but that, being a suit to enforce a right which exists only by operation of the statute, the Legislature could restrict the venue to Travis county. We also cite *Railroad Commission vs. H. & T. C.*, 90 Tex. 340, 354.

II

Under subdivision (b) of question (1), Petitioners first state that this appeal does not involve legislative or administrative action by the court; then devote considerable space to a discussion of the statement by Judge Hutcheson as to exercise by the trial court of its independent judgment on the question of reasonableness or necessity. As heretofore insisted, we submit that the courts, in passing on

statutory appeals from Rule 37 permit orders, are not called upon to make any decision as to the reasonableness thereof, except in the sense that an order that is not justified by the existing facts is unreasonable and arbitrary. As the policy with regard to the granting of exceptions is specifically fixed and established by the terms of Rule 37, as interpreted by the highest court of Texas, no other question as to "reasonableness" could be involved in such an appeal.

Petitioners argue, however, that the determination by the court that certain testimony shows that a certain tract is being drained and that certain other testimony does not show that fact, involves a decision of administrative policy. As the decision as to drainage *vel non* must be made by the Railroad Commission in its exercise of quasi-judicial power, and as this decision involves no administrative policy; but only the weighing of evidence; the finding by the court as to the fact of drainage or non-drainage likewise involves judicial and not administrative action.

III

In reply to question (1c), Petitioners insist that the provisions as to appeal to the Court of Civil Appeals, Supreme Court, etc., clearly restrict the words "a court of competent jurisdiction in Travis County, Texas", to such a state court.

In view of the holding in *Reagan vs. Farmers Loan & Trust Co.*, 154 U. S. 362, and the other cases heretofore cited, and of the subsequent enactment of

the appeal statute herein involved, it is clear that the Legislature intended by these provisions to regulate the appeal as to the cases that are filed in the state district courts, but to leave procedural matters as to the cases that are filed in the federal court subject to regulation by the law applicable to that forum.

A lengthy argument made with regard to the new rules of civil procedure for the district courts of the United States is equally without foundation.

IV

Petitioners, in response to question (3) again base their argument on the insistence that the law in Texas is not clear as to whether the courts trying a Rule 37 permit order appeal may exercise their independent judgment on what is "reasonable". We have heretofore discussed that question, and repetition is unnecessary.

A somewhat lengthy argument is made as to the proper interpretation in this respect of the opinion in *Railroad Commission vs. Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1022. As to that, we refer the court to the discussion on pages 63 to 72 of the

brief of the Sun Oil Company and Magnolia Petroleum Company heretofore filed in this court.

Emphasis herein is supplied.

Respectfully submitted,

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APR 12
CHARLES

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SUPPLEMENTAL ARGUMENT OF SUN OIL COMPANY AND MAGNOLIA PETROLEUM COMPANY REPLYING TO QUESTIONS SUBMITTED BY THE COURT

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FIRM FOUNDATION—AUSTIN

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Supreme Court of the United States

OCTOBER TERM, 1942

NO. 495

G. E. BURFORD, ET AL.,
Petitioners,

v.

SUN OIL COMPANY, ET AL.

NO. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

v.

G. E. BURFORD, ET AL.

SUPPLEMENTAL ARGUMENT OF SUN OIL COMPANY AND MAGNOLIA PETROLEUM COMPANY REPLYING TO QUESTIONS SUBMITTED BY THE COURT

For clarity G. E. Burford and those aligned with him are herein called "petitioners" and Sun Oil Company and Magnolia Petroleum Company are called "cross-petitioners."

This supplemental argument is limited to the questions propounded by the Court.

> 1 (a). *Is the court proceeding provided by Texas law for judicial examination of the orders of the commission a "case or controversy" within the meaning of Article III of the United States Constitution?*

This question should be answered in the affirmative.

From the questions submitted for reargument, it is assumed that this Court is satisfied that under the record the trial court had jurisdiction of this suit in so far as jurisdiction is grounded on diversity of citizenship and a claimed violation of rights under the Fourteenth Amendment to the Constitution of the United States.

The amended well spacing rule under which the orders in controversy were granted (R. 132) provides that exceptions will be granted to permit drilling within shorter distances than those therein specified when necessary either to prevent waste or to prevent confiscation of property. The orders in controversy were granted solely to prevent confiscation of the permittee's property (R. 30, 32, 153, 155), and this suit does not involve, nor do petitioners claim, any hypothesis of possible necessity to prevent waste. *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 83-4, paragraphs 30, 31, 37; *Spear* v. *Humble Oil & Refining Co.*, (Civ. App.) 139 S. W. (2d) 212.

In the *Gulf Land Company case* (134 Tex. at pp. 70-71, 131 S. W. (2d) at p. 80) the court said:

> " . . . the term 'confiscation' evidently has reference to depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind."

The State courts have held that it is mandatory upon the Railroad Commission, rather than discretionary, to grant permits under the "confiscation" exception clause when necessary for that purpose. *Dailey* v. *Railroad Commission*, (Civ. App.) 133 S. W. (2d) 219, 221 (writ refused, which under the provisions of Art. 1728, Vernon's Annotated Civil Statutes, constituted approval by the Supreme Court of Texas of the principles of law declared in the opinion.) The Railroad Commission is bound by its rule and can grant a permt to prevent the confiscation of property only if the well is, in fact, necessary to prevent such confiscation. *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 125-126, 132 S.W. (2d) 254, 255; *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80.

In entering an exception order of the type here involved, the Railroad Commission acts in a "quasi-judicial" capacity rather than a legislative or policy making capacity. *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 81, paragraph 15; *Railroad Commission* v. *Shell Oil Co.*, (Civ. App.) 154 S. W. (2d) 507, 511, paragraph

7, affirmed by Supreme Court, 161 S. W. (2d) 1022; *Magnolia Petroleum Co.* v. *Railroad Commission*, 128 Tex. 189, 194, 96 S. W. (2d) 273, 275.

Art. 6049c, Sec. 8, Vernon's Texas Civil Statutes, 1936,[1] gives anyone who is interested and affected by an order of the Commission the right to file "a suit" in a court of competent jurisdiction in Travis County, Texas, to test the validity of such order, places the burden of proof on the complainant, and declares the order prima facie valid.

In such suit "the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency, there existed sufficient facts to justify the same." *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, 1030; *Letwin* v. *Gulf Oil Corporation*, 164 S. W. (2d) 234, 235, paragraph 1 (writ refused).

The transcript of evidence, if any, introduced

[1]This statute reads as follows:

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation, or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission or the members thereof, as defendants, to test the validity of such laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid.

at the hearing before the Railroad Commission is not admissible on the merits of the issues on the trial;[2] the trial is *de novo* on evidence independently adduced, as in ordinary cases.[3]

On the trial of such suit the court does not deal with hypothetical or future possibilities. The determination is based on the facts existing at the time the order was entered.[4]

The question whether the Railroad Commission can lawfully grant or lawfully refuse a permit under the "confiscation" exception clause depends upon questions of fact and of law, and the judgment entered involves a final judicial determination of the question whether the applicant has the property right to produce valuable oil from his land or whether his property rights in that respect are protected by existing wells, and the determination of the right of owners of adjacent land to prevent drainage of oil from their own property. *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 70,

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[2]Cook Drilling Co. v. Gulf Oil Corp., 139 Tex. 80, 161 S. W. (2d) 1035; Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S. W. (2d) 1106, 1111; Empire Gas & Fuel Co. v. Railroad Commission, (Civ. App.) 94 S. W. (2d) 1240 (writ refused); Railroad Commission v. Shell Oil Company, 139 Tex. 66, 161 S. W. (2d) 1022, 1030.

[3]Cook Drilling Co. v. Gulf Oil Corp., 139 Tex. 80, 161 S. W. (2d) 1035; Railroad Commission v. Shell Oil Company, 139 Tex. 66, 161 S. W. (2d) 1022, 1028, 1029, 1030; Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S. W. (2d) 1106.

[4]Railroad Commission v. Magnolia Petroleum Co., 130 Tex. 484, 109 S. W. (2d) 967, 970; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. (2d) 73, 82, at end of paragraph 25; Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S. W. (2d) 1106, 1111, at end of paragraph 6.

131 S. W. (2d) 73, 80, defining "confiscation" in paragraphs 9-12; *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 125-6, 132 S. W. (2d) 254; *Railroad Commission* v. *Shell Oil Company*, (Civ. App.) 154 S. W. (2d) 507, 509, paragraph 1, affirmed 161 S. W. (2d) 1022, holding "It is now settled that the question of confiscation involves primarily the private property rights of adjacent lease holders. . . . " This is demonstrated by the fact that Burford, et al., contend the wells in controversy are necessary to prevent consfication of their property, whereas cross-petitioners contend they are not necessary for that purpose, but will enable petitioners to take and drain large quantities of cross-petitioners' oil. Furthermore, under the State law the judgment entered by the court in such a case is final and binding until there has occurred a change of conditions from which new and different rights arise. *Magnolia Petroleum Co.* v. *New Process Production Co.*, 129 Tex. 617, 104 S. W. (2d) 1106, 1111, paragraph 6; *Railroad Commission* v. *Humble Oil & Refining Co.*, (Civ. App.) 119 S. W. (2d) 728, 729 (writ refused).

The court proceeding contemplated by the statute in entirely judicial in its nature. It contemplates a hearing of testimony, the findings of facts, the entry of a judgment, and the issuance of process to enforce the judgment. It is not a proceeding in which the court will or may determine the wisdom of the Commission action, but one in which the court will determine only the power and authority of the Commission under the facts to take the action

in question. The proceeding in the court is not legislative in character like that involved in *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210, 29 S. Ct. 67.

On the trial of this case, the questions before the court for determination were (1) whether the orders in controversy were entered in violation of the State conservation statutes and rules and (2) whether the action of the Commission was, under the facts, discriminatory and confiscatory, violating cross-petitioners' rights under the Fourteenth Amendment; and cancellation of the permit orders and ancillary injunctive relief was sought.

We submit there can be no doubt that the suit at bar involves a "case or controversy" within the meaning of Article III of the United States Constitution. The decisions heretofore rendered by this Court are conclusive to this effect. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 236, 57 S. Ct. 461; *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 259, 53 S. Ct. 345; *Gaines* v. *Fuentes*, 92 U. S. 10, 17.

Paraphrasing the language of this Court in the Wallace case, delivered by the present Chief Justice, this suit is an adversary proceeding between parties seeking a final determination of their legal rights; valuable legal rights of parties on each side of the case will be directly affected to a specific and substantial degree by the decision of the issues herein; the questions involved are such as lend themselves to judicial determination and are neither legislative

nor administrative questions; the adjudication of the issues will be final, not advisory or subject to revision by a more authoritative agency; and no abstract determination based on a hypothetical state of facts is involved.

The Reply Brief for G. E. Burford, et al., states, p. 8, "federal jurisdiction is not denied."

> 1 (b) *Assuming it (the court proceeding provided by Texas law for judicial examination of orders of the Commission) involves a case or controversy, does it also involve the determination of state governmental policy committed by state statutes to the state administrative process?*

This question should be answered in the negative.

The statute referred to, Art. 6049c, Sec. 8, gives interested and affected parties the right to file suit to test the validity of *any* order of the Commission, whether it be legislative or policy making in character, such as the spacing rule, or quasi-judicial, such as an order granting an exception to the spacing rule, the right to which exception is dependent entirely upon whether there existed sufficient facts to justify granting the exception under the language of the exception clause in the rule.

As we are not here concerned with legislative orders, we confine our discussion to those which are quasi-judicial. In determining the validity of such an order the court does not substitute its judgment

on any question of governmental policy. All questions of state governmental policy with regard to the circumstances under which exceptions to Rule 37 may be granted by the Railroad Commission were settled by the adoption of that rule, and the specific terms of the rule. In determining the validity of an order granting an exception thereunder the question is simply whether, under the facts, the exception is authorized by the rule.

In the case at bar, involving as it does a quasi-judicial order, the spacing rule, as uniformly construed by the courts of Texas, provides that the Railroad Commission can legally grant an exception to prevent confiscation on land which, under the rule, is entitled to development as a separate tract, if, and only if, the well is in fact necessary to prevent uncompensated drainage of oil from the tract. *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122, 125-126, 132 S. W. (2d) 254, 255; *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 70-71, 131 S. W. (2d) 73, 80; *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, 1025.

The fact that the court trying a suit to test the validity of a Rule 37 permit order is not called upon to determine any matter of state governmental policy is clearly shown by the Shell case just cited, which held that Rule 37 *would be void if it did not set forth a "guide or standard to govern such officials in distinguishing between individuals entitled to such permits or licenses and those not so entitled."* This case also made it clear that in testing the validity of such

an order granting an exception the court is not dealing with a question of administrative discretion, but that the validity of such an order depends on existence of facts showing a right to an exception under one of the exception clauses of the spacing rule.

The case at bar does not involve any contention that the wells are necessary to prevent waste. It merely involves the validity of four wells out of about twenty-five thousand in the East Texas field, and seeks adjudication of the private property rights of the parties.

> 1 (c). *Does Article* 6049(c), *Sec.* 8, *of the Texas Civil Statutes, in providing that review of the commission's order shall be in "a court of competent jurisdiction in Travis County, Texas, and not elsewhere," confine that review to a state court in Travis County?*

This question should be answered in the negative.

In *Reagan* v. *Farmers' Loan & Trust Company*, 154 U. S. 362, 391, 14 S. Ct. 1047, this Court answered this question in the negative as applied to a similarly worded Texas statute authorizing filing of suits "in a court of competent jurisdiction in Travis County, Texas," to cancel orders of the Railroad Commission in railroad matters,[5] and held:

"Nor can it be said in such a case that relief

[5]Acts, 22nd Leg., R. S. p. 55; 10 Gammel's Laws of Texas, 57; now Art. 6453, Ver. Tex. Civ. Stats., 1936.

is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. Cowles v. Mercer Co., 7 Wall. 118; Lincoln Co. v. Luning, 133 U. S. 529, 10 Sup. Ct. 363; Chicot Co. v. Sherwood, 148 U. S. 529, 13 Sup. Ct. 695.

"We need not, however, rest on the general powers of a federal court in this respect; for, in the act before us, express authority is given for a suit against the commission to accomplish that which was the specific object of the present suit. Section 3 provides that any dissatisfied 'railroad company, or other party at interest, may file a petition' 'in a court of competent jurisdiction in Travis County, Texas, against said commission as defendant.' The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis county, but in Travis county. The language, differing from that which ordinarily would be used to describe a court of the state, was selected, apparently, in order to avoid the objection of an attempt to prevent the jurisdiction of the federal courts. The circuit court for the western district of Texas is 'a court of competent jurisdiction in Travis coun-

> ty.' Not only is Travis county within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. 23 Stat. 35. It comes, therefore, within the very terms of the act."

To the same effect are *Railroad Commission of La.* v. *Cumberland T. & T. Co.*, 212 U. S. 414, 420, 29 S. Ct. 357, 360; *McMillan* v. *R. R. Com.*, 51 F. (2d) 400; *Gulf Land Co.* v. *Atlantic Refining Co.*, 113 F. (2d) 902; *Stanolind Co.* v. *Ambrose*, 118 F. (2d) 847; *Platt* v. *Lecocq*, 158 F. 723, 85 C.C.A. 621, 15 L.R.A.N.S. 558; *Landon* v. *Kansas Public Utilities Comm.*, 234 F. 152 (reversed on other grounds, 249 U. S. 236, 39 S. Ct. 268, 63 L. Ed. 577); *Texas & P. R. Co.* v. *Humble*, 181 U. S. 57, 21 S. Ct. 526, 45 L. Ed. 747; 25 *C. J.* 701, Sec. 15.

The Texas Workmen's Compensation Act, Art. 8307, Sec. 5, Vernon's Texas Civil Statutes, gives any interested party the right to "bring suit in the county where the injury occurred" to set aside decision of a compensation claim by the Industrial Accident Board, and this provision is jurisdictional (*Oilmen's Reciprocal Ass'n.* v. *Franklin*, 116 Tex. 59, 286 S. W. 195; *Mingus* v. *Wadley*, 115 Tex. 551, 285 S. W. 1084); but it has been held that such a suit is within the jurisdiction of the federal district court of the district which includes the county of injury, when diversity of citizenship and the requisite jurisdictional amount exist. *Ellis* v. *Associated Industries Ins. Corp.*, (CCA 5) 24 F. (2d) 809, 810, certiorari denied, 278 U. S. 649. This is entirely analogous to the question at bar.

Since the appeal statute involved in the case at bar was originally enacted in 1931 and later amended in 1935 (Acts 1931, 1st C. S., p. 46; Acts 1935, R. S., p. 180) long after the decision in *Reagan* v. *Farmers' Loan & Trust Co.*, supra, held that a similarly worded Texas statute conferred jurisdiction on the Federal Court in Travis County, as well as on the state courts, it must be assumed that the Legislature enacted these statutes in the light of this decision and intended that this special appeal might be entertained by the federal as well as by a state court in Travis County. *Arrowood* v. *Blount*, 121 Tex. 52, 41 S. W. (2d) 412, 414; *Stephens County* v. *Hefner*, 118 Tex. 397.

2. *Are there grounds similar to those existing in Railroad Commission* v. *Pullman Co.*, 312 *U. S.* 496, *which make it appropriate for the district court in its discretion to withhold the exercise of its equity jurisdiction?*

This question should be answered in the negative.

The Pullman case involved the construction of a state statute which had not been construed by the courts of the state and rights under the Federal Constitution, but the court could avoid determination of the latter question if plaintiff was entitled to judgment on the question of state law. To avoid making a "forecast" or "tentative answer which may be displaced tomorrow" on the question of state law, this Court remanded the case with directions to the trial court to retain the bill pending determina-

tion of this state law question by proceedings in the state courts.

No such situation exists in the case at bar. The first four points presented in cross-petitioners' brief involve questions of substantive law established by repeated decisions of the state courts on which cross-petitioners are entitled to judgment. The Texas law applicable to the undisputed evidence in this case on all of these first four grounds has been definitely and clearly established by the decisions cited in the brief and typewritten memorandum heretofore filed, and no useful purpose would be served by repeating the authorities here. Likewise, no purpose of comity or "judicious self-restraint" would be served by a refusal of this Court to act now on those four points. A decision for cross-petitioners on any one of those first four issues would require rendition of a judgment in their favor, and thus dispose of this case. Each of those questions involve purely matters of law based on undisputed evidence in the record. Only in the event that this Court holds against cross-petitioners on all four of these issues, either by holding that the State law is contrary to our statement of it or that the issues are not established by undisputed evidence, is it necessary to remand the case for further development of the issues of state law or to determine the constitutional questions raised.

Only in the event of a remand is it necessary for the court to go into the question of the scope of judicial review laid down by the state courts in proceedings under Art. 6049c, Sec. 8. This necessarily fol-

lows if, as we contend, the facts establishing the first four issues in cross-petitioners' brief are undisputed, since undisputed evidence presents merely a question of law, which concededly is within the province of the judiciary. But, in our view, the state law is clearly and finally established, even on the question of scope of judicial review in the event of a remand, by the decisions of the Texas Supreme Court in *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, and *Cook Drilling Company* v. *Gulf Oil Corporation*, 139 Tex. 80, 161 S. W. (2d) 1035, which were simultaneously announced by the court, and are discussed together on pp. 63-72 of cross-petitioners' brief.

We submit that this case is entirely dissimilar to the situation in the Pullman case.

We further suggest that the rule announced in the Pullman Company case should not be extended to cover cases not clearly falling within its terms. It is of the utmost importance to litigants and courts that the jurisdiction that can and will be exercised by a court be definitely and clearly ascertainable before a suit is filed. If a case of which the federal courts clearly have jurisdiction is filed and finally reaches this Court and is then remanded, as was the Pullman case, with instructions that it be held on the docket pending litigation of the state law questions in the state courts, and must then be tried again in the federal court, the litigants and the courts will be subjected to excessive expense and delay—resulting

in impairment, if not practical loss, of the right to resort to the United States Courts.

If the state court, pursuant to such an order, proceeds to decide the questions arising under the United States Constitution and laws as well as those arising under state laws (and parties would doubtless feel constrained to present all such issues in one suit, in view of the well established principle of state law that a judgment of a state court shall be "conclusive not only as to the subject matter determined, but also as to every other matter which the parties might have had decided": *Cain* v. *Balcom*, 130 Tex. 497, 109 S. W. (2d) 1044, 1046; *Shell Petroleum Corp.* v. *Railroad Commission*, 86 S.W. (2d) 57, 59; *Ames* v. *Herrington*, 139 S. W. (2d) 183, 190; *Trigg* v. *Whittenburg*, 129 S. W. (2d) 472, 474), the decision of the State court will be *res judicata* and the right to resort to the federal trial court will be lost and the litigants will be confined to their remedies in the appellate courts, state and federal.

Even if the state courts decide only state law questions and effectively leave the federal questions for decision by the United States courts, still the findings of fact relevant thereto that are made in the state court will be binding by estoppel when the federal questions are submitted to a federal court. *Houston Terminal Land Co.* v. *Westergreen*, 119 Tex. 204, 27 S. W. (2d) 526.

In this connection we call attention to the fact that the plaintiff in a case against a citizen of another

state can file his suit in the state court, but that the defendant has the unconditional right to remove it to the federal court. Thus a plaintiff who thinks his case may come within the rule laid down in the Pullman case and who decides that he would rather try it in the state court than to run the risk of litigating it through the federal trial and appellate courts, and then have it referred in part to the state courts, would not be able to make a real choice.

We further suggest that the question as to whether state court decisions, no matter how numerous and consistent, have settled the law governing a particular set of facts is often a difficult one. The numerous instances in which the plaintiff and defendant each cite the same case as authority for opposing contentions should, we submit, preclude the adoption, and certainly the extension, of any rule which makes the exercise of the federal court's undoubted jurisdiction depend upon the question as to whether the applicable state law has been settled by the state courts. The possibility of the rendition of opinions by state courts pending the appeal in the federal court is also fruitful of difficulty. Such a rule must always work to the advantage of the defendant and to the prejudice of the plaintiff.

3. *In view of the recent decisions of the Texas courts, are there grounds similar to those existing in Railroad Comm'n. v. Rowan & Nichols Oil Co.*, 311 U. S. 614, 615, *which make it appropriate for the district court to decline jurisdiction of the cause?*

This question should be answered in the negative.

We understand that this question relates only to the paragraph which was added to the opinion in *Railroad Commission* v. *Rowan & Nichols Oil Company* by the order on petition for rehearing set forth in 311 U. S. 614, 61 S. Ct. 66. This paragraph states that it is not clear as to whether the Texas decisions permit the local courts to exercise an independent judgment on what is reasonable; in other words, that the applicable law as to the *scope of judicial review* of the kind of order there involved had not then been settled by the state courts. As to this, we refer to the preceding discussion of question number two and *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, and *Cook Drilling Company* v. *Gulf Oil Corp.*, 139 Tex. 80, 161 S. W. (2d) 1035, decided subsequently to the decision in the Rowan & Nichols case, both of which are hereinabove discussed.

It is readily apparent that question three is material only in the event of a remand and does not arise if cross-petitioners are entitled to judgment on any one of the first four points of their brief, all of which present questions of law arising on undisputed facts. With this appraisal of its position in the case, we will now discuss question three.

The court inquires whether recent decisions of the Texas courts present grounds similar to those existing in the Rowan & Nichols case. We presume the court refers to *Railroad Commission of Texas* v.

Wencker, 168 S.W. (2d) 625 (decided by the Supreme Court of Texas on February 10, 1943, but not yet officially reported) as that is the only recent decision that has been cited in this connection by petitioners.

In a memorandum filed with the court after the original argument petitioners insisted that the opinion in the Wencker case "conclusively demonstrates * * * that the Texas law on the scope of judicial review of Rule 37 orders is so uncertain that the federal courts should not assume the burden of passing on the validity of such orders under the Texas law." This contention is based on the following paragraph of the opinion in the Wencker case:

> "The statutes authorize the Railroad Commission to handle the details relating to the production of oil and gas in the State. Article 6004 et seq., Vernon's Annotated Civil Statutes. The Railroad Commission has exclusive original jurisdiction to determine the matter of changed conditions in granting permits to drill wells, *subject to the right of appeal to the courts*. Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 101 S. W. (2d) 1106; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. (2d) 296, 83 S. W. (2d) 935, 99 A.L.R. 1107. The Railroad Commission is given the power to determine *primarily all issues*, that is, all issues that are not established as a matter of law; and to permit the courts to pass upon a question not passed on by the Commission would violate such power. Gulf Land Co. v. Atlantic Refining Co., supra; Brown v. Humble Oil & Refining Co., supra." (Emphasis ours.)

Petitioners have insisted first, that the language of this paragraph is inconsistent with the statement in *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, 1029, that "the doctrine that the administrative agency should take the testimony and make the findings of fact, and that the findings should be binding upon the court, is foreign to the law of this State."

Petitioners' attorneys have evidently overlooked the statement in the third sentence of the quotation from the Wencker case to the effect that the decision of the Railroad Commission as to changed conditions is "*subject to the right of appeal to the courts.*" We also call attention to the fact that the concluding sentence of the quoted paragraph states that the power of the Railroad Commission is to "determine primarily all fact issues," which is a far different thing from a determination that is binding on the courts, and that this sentence concludes with a definite indication that the courts can pass upon any question that has been passed on by the Commission, but not on a question that has not been passed on by it.

This latter pronouncement is entirely consistent with the law announced in *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73, 84, to the effect that a disputed issue of fact that has not been passed on by the Commission cannot be decided by the courts and made the basis of a judgment sustaining the permit; in other words, that a permit cannot be upheld on a ground of exception other than

the one on which the Commission granted the permit, unless the right to the permit on such other ground is shown on the trial as a matter of law. *Stanolind Oil & Gas Co.* v. *Midas Oil Co.*, 143 S. W. (2d) 138 (writ refused); *Shell Petroleum Corp.* v. *Railroad Commission*, 133 S. W. (2d) 194; *Humble Oil & Refining Co.* v. *Potter*, 143 S. W. (2d) 135.

Petitioners also insist that the Supreme Court in the Shell case (139 Tex. 66, 161 S. W. (2d) 1022) held that the Texas statutes do not authorize the making of any findings of fact by the administrative agency, but that the same court in the Wencker case examined the record to determine what findings were made by the Commission. The sentence in the Shell case referred to by petitioners was undoubtedly intended as a holding that the laws of Texas do not provide for the filing by the Railroad Commission of *written* findings of fact. This is evident because in the last portion of the second paragraph, 161 S. W. (2d) at 1029, the court refers to the question as to whether the administrative agency "came to the proper fact conclusion." The opinions of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, *Cook Drilling Co.* v. *Gulf Oil Corp.*, 139 Tex. 80, 161 S. W. (2d) 1035, and the opinion of the Court of Civil Appeals in *Stanolind Oil & Gas Co.* v. *Midas Oil Co.*, 143 S. W. (2d) 138 (writ refused, and holdings consequently approved), *Shell Petroleum Corp.* v. *Railroad Commission*, 133 S. W. (2d) 194, 196, and *Humble Oil & Refining Co.* v. *Potter*, 143 S. W. (2d) 135, 137, clearly show that the rule is well

established that the Railroad Commission has original jurisdiction to consider and decide all issues of fact presented by the evidence at a hearing on an application for exception to Rule 37; but the opinion of the Supreme Court in the above mentioned Shell and Cook cases, and the subsequent opinion of the Court of Civil Appeals in *Letwin* v. *Gulf Oil Corp.*, 164 S.W. (2d) 234 (writ refused), also clearly show that the Commission's findings of fact are not required to be written and are not binding on the courts in a suit to test validity of an order granting a permit, in that the courts try such a case *de novo* and make their independent determination of all issues of fact and law.

Burford, et al, also insist that the opinion in the Shell case, 161 S. W. (2d) 1022, is inconsistent with that in the Wencker case, because of a statement in the former that the record before the Railroad Commission is not admissible as evidence *per se* in the trial court (161 S. W. (2d) at 1030), whereas the same court in the Wencker case examined the record before the Railroad Commission to determine what questions had been presented to it and what findings had been made. But the holding in the Shell case that "the evidence heard by the agency is not *per se* admissible upon the trial in the District Court" (i. e., not admissible as original evidence to establish the existence of facts as testified to by witnesses at the Commission hearing) and the further statement in the Shell case that the question as to whether the record of the Commission hearing is

admissible on the trial in the District Court "must depend upon its own merits under the general rules of evidence" (161 S. W. (2d) at 1030) are entirely consistent with the holding in the Wencker case. In the Wencker case, the record before the Commission was not offered as evidence *per se* on the right to a permit. The controlling question in the Wencker case was whether, in granting Wencker a permit for No. 2 during the pendency of a suit, on the first appeal of which it was decided that he had a right to one well as a matter of law, the Commission had intended to grant the permit as a first well or as a second well. The Commission contended that it had granted the well as a first well, hence that Wencker suit, when it came on for a second trial, had become moot. The court examined the record before the Commission solely for the purpose of determining what the Commission had passed on, and on deciding that the Commission had granted No. 2 with the intention that it be the first well, held the suit to be moot. Under the particular facts of the Wencker case, the record before the Commission was the best evidence of what the Commission had passed on. The court considered it solely for this special purpose. Clearly the examination of the record by the court in the Wencker case for a *special purpose* was not in the slightest degree inconsistent with any part of the opinion in the Shell case.

The Wencker case did not discuss the scope of judicial review, and does not undertake to change

the rule on that subject announced in *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1022, and *Cook Drilling Co.* v. *Gulf Oil Corp.*, 139 Tex. 80, 161 S. W. (2d) 1035. The Wencker case could not have involved the scope of judicial review in determining the validity of an order of the Commission, because the court held the case moot and did not undertake to decide the merits.

We also suggest that even if there be inconsistency between one opinion of the Supreme Court and another subsequently rendered, it does not have the effect of rendering the law uncertain, but merely impliedly overrules the inconsistent portion of the earlier opinion. Furthermore, the evidence in the case at bar is such that the alleged uncertainty, even if it existed, would still leave enough clearly established Texas law to finally decide this case on any one of several grounds.

The insistence that the microscopic differences between the words used in the opinion in the Wencker case and in the Shell case show that the law is unsettled is the best possible evidence that the order made in Railroad Commission v. *Pullman Company*, 312 *U. S.* 496, *if held applicable to cases such as this, will result in the surrender by the federal courts to the state courts of a large part of their jurisdiction.*

We submit that it will be impossible to find many cases, if any, in which the material issues of fact are more clearly established by the undisputed evi-

dence and in which the governing principles of state law have been more clearly settled.

Respectfully submitted,

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ACKNOWLEDGEMENT OF SERVICE

Service of the foregoing Supplemental Argument is acknowledged, this day of April, 1943.

Attorney for G. E. Burford and X Y Z Oil & Gas Company

Attorney for Railroad Commission of Texas and its Members.

FILE COPY

JUN 17 1943

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,
Petitioners,

v.

SUN OIL COMPANY, ET AL.

No. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

v.

G. E. BURFORD, ET AL.

PETITION FOR REHEARING OF SUN OIL COMPANY AND MAGNOLIA PETROLEUM COMPANY

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G. E. BURFORD, ET AL.

PETITION FOR REHEARING OF SUN OIL COMPANY AND MAGNOLIA PETROLEUM COMPANY

To the Honorable Supreme Court of the United States:

Sun Oil Company and Magnolia Petroleum Company petition the Court to grant a rehearing on the opinion delivered and judgment entered herein on May 24, 1943, and on such rehearing to set aside only that part of the judgment of the

Circuit Court of Appeals which remands the cause to the District Court, and to render judgment for Sun Oil Company and Magnolia Petroleum Company in accordance with the prayer in their Cross-Petition for Writ of Certiorari; in the alternative, to reform and correct the judgment of the District Court in such way that the dismissal of this suit will be without prejudice, rather than a bar, to the determination on the merits by the state courts, in a suit to be filed for such purpose, of the questions here presented which this Court refused to decide; and as grounds respectfully show:

1.

This Court erred in refusing, through the majority opinion and judgment, to exercise jurisdiction to determine and in failing to determine the merits of the several assignments of error in the Cross-Petition for Writ of Certiorari and Brief of Sun Oil Company and Magnolia Petroleum Company, here adopted by reference and separately re-urged.

2.

This Court having held in the majority opinion that the federal court, instead of deciding the merits, should stay its hand to give the state courts the first opportunity to consider the issues involved, erred in affirming, and in failing to reform, the District Court's general judgment of dismissal in such a way that it will be without prejudice, instead of a bar, to presentation of the merits of the case to the state courts for determination in a suit to be filed for that purpose.

ARGUMENT

(1) Error in Refusing to Decide Merits

The reason assigned by the majority opinion for holding that the federal courts should not decide the merits of the case is the possibility that the decision reached by the federal courts might conflict with state policy.

As the first vital premise for this reason the majority held that the permit here involved, which was granted by the Texas Railroad Commission on the sole ground of necessity to prevent confiscation of the private property of G. E. Burford, does not involve merely private property rights, but involves a matter of vital interest to the general public affecting the entire state's conservation system and with implications to the whole economy of the state.[1] This basic premise for the Court's holding is fallacious because:

(a) The Texas courts, whose decision on this point of state law should be accepted by this Court as authoritative, have held, contrary to the holding of this Court, that the question involved in

---

[1]We respectfully submit that the suggestion in the opinion that a permit such as this, involving as it does only 4/17,000ths of the permits granted in this one field of the state, ~~impacts~~ broad implications to the state's conservation system and to the whole economy of the state, is not only unsupported by the record but is exaggerated far beyond the facts. Like the suggestion that "an additional permit may affect pressure on a well miles away", the effect of this permit upon the state's conservation system and the state's economy would be so minute and infinitesimal that it could not be measured by the finest technical means that science has devised. The law ordinarily does not notice such little things. The noticeable effect is only in the immediate locality, a very small spot in a field this size.

a permit granted solely to prevent confiscation of the permittee's property, is primarily one of private property rights.[2]

(b) It cannot be held, and is not even contended, that this permit is sustainable on the theory of necessity to prevent waste or "irretrievable loss of oil in other parts of the field," for it is the settled law of the state that such a permit is not sustainable on the theory, not found by the Railroad Commission, of necessity to prevent waste.[3]

(c) No question of state policy is involved **in this case** for the reason that all questions of state governmental policy with regard to the circumstances under which exceptions to Rule 37 may be granted by the Railroad Commission were settled by the adoption of that rule, and the specific terms of the rule, and the decisions of the Texas Courts thereon. In granting the permit the Railroad Commission acted in a quasi-judicial capacity, and in testing the validity of such exception permit, the question is simply whether, under the facts, the exception is authorized by the rule.[4]

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[2] *Railroad Commission v. Shell Oil Company*, (Civ. App.) 154 S. W. (2d) 507, 509, paragraph 1, affirmed 161 S. W. (2d) 1022, holding "It is now settled that the question of confiscation involves primarily the private property rights of adjacent lease holders . . ." *McCutchin v. Sun Oil Company*, 139 S. W. (2d) 848, 849, (writ refused); *Stanolind Oil & Gas Co. v. Midas Oil Company*, 123 S. W. (2d) 911, 913.

[3] See authorities cited p. 2, Supplemental Argument of Sun Oil Company and Magnolia Petroleum Company Replying to Questions Submitted by the Court.

[4] For detailed discussion and authorities, see pp. 4-5, 8-10, Supplemental Argument of Sun Oil Company and Magnolia Petroleum Company Replying to Questions Submitted by the Court.

(d) There is not here involved the matter of giving the state courts the "first opportunity to consider" the questions of substantive law presented in Cross-Petitioners' Brief. The state law on these points is established by repeated decisions of the state courts, so that there is no occasion for federal conflict, and the federal courts are not left to grope in the dark and hazard a "guess" as to the state law as a matter of first impression, as would be the case if this court did not have the benefit of the numerous Texas decisions mentioned in the majority opinion, p. 11, fn. 28. If a question of state policy could be involved in a suit of this kind, it is one which has been settled by the decisions of the state courts, and we submit there is no more reason for the federal courts to decline jurisdiction in this case on the ground that they might make a misstep in following the law as declared by the state courts than in any other type of case wherein the federal courts are duty-bound to apply the state law.

As a second premise for the holding that the federal courts should not decide the merits of the case, the majority opinion, p. 8, states that the Texas Legislature provided for the "concentration of all direct review . . . in the State district courts of Travis County", and that "confusion" might result if federal courts exercise their equity jurisdiction in these cases, giving examples of what the majority considered to be confusing results of prior federal decisions. All the examples given dealt with **legislative** orders, the power to make which under the state law had not yet been de-

cided by the state courts, so that such question was **one of first impression** on the part of the federal courts. In each particular the examples cited are distinguishable from the case at bar. The majority expresses the view, p. 12, that "this use (disuse?) of equitable powers is a contribution of the courts in furthering the harmonious relationship between state and federal authorities without the need of rigorous congressional restrictions of those powers". (Matter in parentheses ours.) We respectfully submit that this second premise for the majority holding is fallacious because:

(a) However laudable may be the purpose of the court in undertaking this contribution to harmonious relationship, it is obviously a matter addressing itself to the wisdom of the legislature, as the quoted statement impliedly recognizes. Furthermore, not only has Congress declared the public policy to be that the federal courts shall have and exercise jurisdiction in cases of diversity of citizenship, but the Texas legislature by enacting Article 6049c, Section 8, in the form it was enacted long after the law on such matters was settled by the decision of this court in *Reagan v. Farmers Loan and Trust Company*, 154 U. S. 362, 14 S. Ct. 1047, and in the light of that decision,[5] has indicated that the State of Texas is satisfied for the federal courts to exercise jurisdiction to cancel Railroad

[5]See discussion of legislative history and holdings with reference to similar statutes, contrary to the holdings of the court in this case discussed pp. 10-13, Supplemental Argument of Sun Oil Company and Magnolia Petroleum Company Replying to Questions Submitted by the Court.

Commission orders in a case of this kind. In spite of these expressions from both the state and federal policy making bodies, the majority opinion disagrees with the wisdom and expediency of both in declining jurisdiction on the ground that it is unwise to exercise it. How can this court undertake to say that the supposed public benefit which moved Congress to confer jurisdiction on federal courts in cases of diversity of citizenship is of less consequence than the supposed public detriment which forms the basis of the majority's refusal to act?

(b) The majority opinion is clearly in error in stating, p. 8, that the review provided by Article 6049c, Section 8, is confined to "State district courts of Travis, County, Texas." On the contrary, the statute reads "~~any~~ a court of competent jurisdiction in Travis County;" and the federal district court of the western district is such a court.

(2) In Any Event the District Court's Judgment Should be Reformed so That it Will be Without Prejudice, Rather Than a Bar, to the Determination of the Merits by the State Courts in a Suit to be Filed for That Purpose.

If the Court concludes that the federal courts should not decide the merits of this case, then we earnestly urge the Court to modify the district court's judgment in such way that it will be without prejudice to Cross-Petitioners availing themselves of the judicial review of the permit order in the state courts which the majority opinion, p.

12, finds to be an ~~expeditious~~ expeditious and adequate remedy and evidently intended Cross-Petitioners should pursue for a final determination of the controversy.

The trial court stated in its conclusions of law that it is of the opinion that "the various matters of state law raised present no Federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction"; and further suggested that the parties should be "relegated to the state courts" for determination of the matters of state law (R. 91-2); but the judgment of the trial court dismissed the complaints without reserving to Cross-Petitioners the right to present matters of state law to the state courts (R. 87); and in legal effect this is an adverse adjudication of such matters, under the state and federal decisions, and res adjudicata as to any new suit between the parties on the same subject matter. 34 C. J. 788, Sec. 1206; *Jones v. City of Uvalde*, (Civ. App.) 144 S. W. (2d) 932 (writ refused); 26 Tex. Jur. 95, Sec. 397; *Baker v. Cummings*, 181 U. S. 117, 21 S. Ct. 578; *McWilliams v. Blackard*, (C. C. A. 8) 96 F. (2d) 43; *Sacks v. Stecker*, (C. A. A. 2) 62 F. (2d) 65, headnotes 8 and 9; *Wilson Cypress Co. v. Atlantic Coast Line R. Co.*, (C. C. A. 5) 109 F. (2d) 623, 625; *Brooks v. Arkansas-Louisiana Pipe Line Co.*; (C. C. A. 8) 77 F. (2d) 965, 968.

We are advised that our adversaries expect to plead res adjudicata upon our filing of a new suit in the state court in the event this Court affirms the District Court's judgment without modifying it so that it will be without prejudice.

Under the Texas law, a recital in the judgment of the trial court herein that the dismissal is without prejudice to the presentation of the issues of State law to the State courts, in a suit to be filed for that purpose, would prevent the judgment of dismissal from being res judicata. 26 Tex. Jur. 96; *Winter Garden Land Co. v. Zavala-Dimmit County Water Improvement District No. 1,* (Civ. App.) 5 S. W. (2d) 606 (error dismissed); *Haralson v. St. L. S. W. R. Co.,* (Civ. App) 62 S. W. 788; *Great Southern Life Insurance Co. v. Johnson,* (Com. App.) 25 S. W. (2d) 1093.

We believe that the judgment of this Court affirming the dismissal of this cause should be interpreted in the light of the opinion of this Court; but that all doubt as to *res judicata* should be removed by a modification of the judgment as herein requested.

This is a most serious matter because this Court has not passed upon the merits of our various assignments, holding that such matters should be presented to the state courts for determination. yet by affirming the trial court's judgment of straight dismissal with no saving clause this court, in effect, denies Cross-Petitioners the right to pursue the remedy which this Court points to and directs that they shall take. This situation was called to the attention of the Court on p. 16 of the Cross-Petition for Writ of Certiorari, and at the top of p. 52 of the Brief of Sun Oil Company and Magnolia Petroleum Company in this Court, and was the subject of their 8th assignment of error in their brief in the Circuit Court of Appeals

and the first point in Appellants' Petition for Rehearing in that court. (R. 416.)

WHEREFORE, Sun Oil Company and Magnolia Petroleum Company pray that the Petition for Rehearing be granted, and that on rehearing the Court set aside only that part of the judgment of the Circuit Court of Appeals which remands the cause to the District Court, and to render judgment in accordance with the prayer in their Cross-Petition for Writ of Certiorari; and in the alternative to reform and correct the judgment of the Dstrict Court in such way that the dismissal of this suit will be without prejudice, rather than a bar, to the determination by the state courts in a suit to be filed for such purpose, of the questions here presented; for costs and general relief.

Respectfully submitted,

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Counsel for Sun Oil Company.

We, the undersigned attorneys of record for Sun Oil Company and Magnolia Petroleum Company in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness our hands, this 15th day of June, 1943.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Petition for Rehearing is acknowledged, this the _____ day of June, 1943.

Attorney for G. E. Burford and
X. Y. Z. Oil & Gas Company

Attorney for Railroad Commission
of Texas and its Members

p. 15

SUPREME COURT OF THE UNITED STATES.

Nos. 495 and 496.—October Term, 1942.

495	G. E. Burford, et al., Petitioners, *vs.* Sun Oil Company, et al.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
496	Sun Oil Company, et al., Petitioners, *vs.* G. E. Burford, et al.	

[May 24, 1943.]

Mr. Justice Black delivered the opinion of the Court.

In this proceeding brought in a federal district court, the Sun Oil Co. attacked the validity of an order of the Texas Railroad Commission granting the petitioner Burford a permit to drill four wells on a small plot of land in the East Texas oil field.[1] Jurisdiction of the federal court was invoked because of the diversity of citizenship of the parties, and because of the Companies' contention that the order denied them due process of law. There is some argument that the action is an "appeal" from the State Commission to the federal court since an appeal to a State court can be taken under relevant Texas statutes;[2] but of course the Texas legislature may not make a federal district court a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction,[3] and the Circuit Court of Appeals

[1] The Magnolia Petroleum Co. was permitted to intervene with a similar complaint against the validity of the order. The parties defendant include Burford; Burford's assignee, the X Y Z Oil and Gas Co.; and the Commission. Hereafter the original plaintiffs will be referred to as the Companies and the defendants will be referred to as Burford or as the Commission. The case is here on a petition for certiorari by the Commission and on a cross-petition for certiorari by the Companies.

[2] For a description of the nature of the so-called "appeal", see Stanolind Oil & Gas Co. v. Midas Oil Co., 123 S. W. 2d 911, 913; Gulf Land Co. v. Atlantic Refining Co., 134 Texas 59, 73.

[3] See the discussion in the opinion below, 130 F. 2d 10, 17; cf. Tennessee Coal Co. v. George, 233 U. S. 354, 359, 360 and Texas Pipe Line v. Ware, 15 F. 2d 171. A statute similar to that involved in the instant case, which permits suit in any competent court of Travis County, Texas, has been construed to be an expression by the State of willingness to allow these proceedings to be brought in a federal court, Reagan v. Farmers Loan & Trust, 154 U. S. 362, 392. Since federal equity jurisdiction depends on federal statutes, the Texas statutory provision has little meaning as applied to such cases.

in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order.

Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest";[4] for it "is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."[5] While many other questions are argued, we find it necessary to decide only one. Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?

The order under consideration is part of the general regulatory system devised for the conservation of oil and gas in Texas, an aspect of "as thorny a problem as has challenged the ingenuity and wisdom of legislatures." *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 579. The East Texas field, in which the Burford tract is located, is one of the largest in the United States. It is approximately forty miles long and between five and nine miles wide, and over 26,000 wells have been drilled in it.[6] Oil exists in the pores and crevices of rocks and sand and moves through these channels. A large area of this sort is called a pool or reservoir and the East Texas field is a giant pool. The chief forces causing oil to move are gas and water, and it is essential that the pressures be maintained at a level which will force the oil through wells to the surface. As the gas pressure is dissipated, it becomes necessary to put the

[4] United States v. Dern, 289 U. S. 352, 360.

[5] Pennsylvania v. Williams, 294 U. S. 176, 185. "Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. . . . There must be reluctance even greater when the rights are strictly local, jurisdiction having no other basis than the accidents of residence." Hawks v. Hamill, 288 U. S. 52, 61.

[6] For a description of the East Texas field see Railroad Commission v. Rowan and Nichols Oil Co., 311 U. S. 570, 574; Tucker, Today's East Texas Problems Analyzed in Survey of Field, Oil and Gas Journal, April 1, 1937, p. 10; Weber, East Texas As It Is Today, Oil and Gas Journal, April 27, 1939, p. 12. The latter article includes a map of the area showing various developments in the field. For a simple outline map, see 1941 Annual Report, Oil & Gas Division, Texas Railroad Commission, p. 34.

well "on the pump" at great expense,[7] and the sooner the gas from a field is exhausted, the more oil is irretrievably lost. Since the oil moves through the entire field, one operator can not only draw the oil from under his own surface area, but can also, if he is advantageously located, drain oil from the most distant parts of the reservoir. The practice of attempting to drain oil from under the surface holdings of others leads to offset wells and other wasteful practices; and this problem is increased by the fact that the surface rights are split up into many small tracts.[8] There are approximately nine hundred operators in the East Texas field alone.

For these, and many other reasons based on geologic realities, each oil and gas field must be regulated as a unit for conservation purposes. Compare *Railroad Commission* v. *Rowan and Nichols*, 311 U. S. 570, 574. The federal government, for the present at least, has chosen to leave the principal regulatory responsibility with the states, but does supplement state control.[9] While there is no question of the constitutional power of the State to take appropriate action to protect the industry and protect the public interest, *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Champlin Refining Co.* v. *Commission*, 286 U. S. 210, the State's attempts to control the flow of oil and at the same time protect the interest of the many operators have from time to time been entangled in geological-legal problems of novel nature.

Texas interests in this matter are more than that very large one of conserving gas and oil, two of our most important natural resources. It must also weigh the impact of the industry on the whole economy of the state and must consider its revenue, much of which is drawn from taxes on the industry and from mineral lands preserved for the benefit of its educational and eleemosynary institutions.[10] To prevent "past, present, and imminent

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[7] Geological factors making for the necessity of pumping are described in Ely, The Conservation of Oil, 51 Harv. L. Rev. 1209, 1220. The relation of natural gas to oil production is described in Miller, Functions of Natural Gas in the Production of Oil.

[8] Wells in the East Texas field considered unnecessary from the engineering standpoint are said to have cost $160,000,000. For a discussion of this superfluous well problem see Ely, The Conservation of Oil, *supra*, 1232. In 1941 there were 910 operators in the East Texas field. 1941 Railroad Commission Report, *supra*, 208.

[9] 15 U. S. C. § 715; Panama Refg. Co. v. Ryan, 293 U. S. 388; note 12, *infra*.

[10] The problem of gaining an adequate revenue from the petroleum industry was particularly serious in Texas during the period 1930-35. The question was discussed by Governor Sterling in messages to the legislature in 1931, 1932, and 1933, and by Governor Allred in 1935. See The Texas Senate Journal,

evils" in the production of natural gas, a statute was enacted "for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production." The primary task of attempting adjustment of these diverse interests is delegated to the Railroad Commission which Texas has vested with "broad discretion" in administering the law.[11]

The Commission, in cooperation with other oil producing states, has accepted State oil production quotas and has undertaken to translate the amount to be produced for the State as a whole into a specific amount for each field and for each well.[12] These judgments are made with due regard for the factors of full utilization of the oil supply, market demand, and protection of the individual operators, as well as protection of the public interest. As an essential aspect of the control program, the State also regulates the spacing of wells. The legislature has disavowed a purpose of requiring that "the separately owned properties in any pool [should] be unitized under one management,

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Jan. 13-May 23, 1931, p. 526; *ibid.*, July-August, 1931, p. 594; *ibid.*, September-October, 1931, p. 164; *ibid.*, August-September, 1932, p. 60; *ibid.*, Reg. Sess., 1933, pp. 20, 24; *ibid.*, Reg. Sess., 1935, pp. 587, 589-90.

[11] Vernon's Texas Stat. § 6008(1)(22).

[12] For description of the methods of regulation of the oil industry see Marshall and Meyers, Legal Planning of Petroleum Production, 41 Yale L. Jour. 33; Marshall and Meyers, Legal Planning of Petroleum Production: Two Years of Proration, 42 Yale L. Jour. 702; Ely, The Conservation of Oil, 51 Harv. L. Rev. 1209; Hardwicke, Legal History of Conservation of Oil in Texas, in The American Bar Association's publication, Legal History of Conservation of Oil and Gas, 214; Walker, The Problem of the Small Tract Under Spacing Regulations, 17 Tex. L. Rev. (Appendix) 157; Summers, Oil Production Regulation—Due Process, 19 Texas L. Rev. 1; Davis, Judicial Emasculation of Administrative Action, 19 Texas L. Rev. 29. The Interstate Oil Compact Commission is described in its own publication, The Interstate Compact to Conserve Oil and Gas (1942), published over the signature of Governor Phillips of Oklahoma. Federal wartime regulations concerning the drilling of wells have been issued by the Petroleum Administration for War. See Conservation Order M-68 as amended, 8 Fed. Reg. 3955, discussed in 10 George Washington L. Rev. 926.

The Commission has described its own regulatory program as follows:

"The Railroad Commission of Texas carries out its functions of production control or proration by an elaborate system of orders, schedules, and reports. In order to keep the production of oil for the State during any period within the limits of a predetermined figure, the Commission sets by order the maximum allowable production for the State. This total allowable is then distributed among the various fields, and the allowable for each field in turn is allocated among the component properties so that the Commission, under this process, fixes the daily allowable for each well during the effective period of each allowable order. After these calculations have been made, a schedule of these allowables is prepared, printed, and mailed to each operator so that he may know how much oil may be produced from each of his leases during the month." 1939 Annual Report of the Oil and Gas Division, Texas Railroad Commission, p. 9.

control or ownership"[13] and the Commission must thus work out the difficult spacing problem with due regard for whatever rights Texas recognizes in the separate owners to a share of the common reservoir. At the same time it must restrain waste, whether by excessive production or by the unwise dissipation of the gas and other geologic factors that cause the oil to flow.

Since 1919 the Commission has attempted to solve this problem by its Rule 37. The rule provides for certain minimum spacing between wells, but also allows exceptions where necessary "to prevent waste or to prevent the confiscation of property." The prevention of confiscation is based on the premises that, insofar as these privileges are compatible with the prevention of waste and the achievement of conservation, each surface owner should be permitted to withdraw the oil under his surface area, and that no one else can fairly be permitted to drain his oil away. Hence the Commission may protect his interest either by adjusting his amount of production upward, or by permitting him to drill additional wells. "By this method each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land."[14]

Additional wells may be required to prevent waste as has been noticed, where geologic circumstances require immediate drilling: "The term 'waste,' as used in oil and gas rule 37, undoubtedly means the ultimate loss of oil. If a substantial amount of oil will be saved by the drilling of a well that otherwise would ultimately be lost, the permit to drill such well may be justified under one of the exceptions provided in Rule 37 to prevent waste." *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 70.

The delusive simplicity with which these principles of exception to Rule 37 can be stated should not obscure the actual non-legal complexities involved in their application.[15] While the surface

[13] Vernon's Texas Stat. § 6014 g.

[14] Brown v. Humble Oil Co., 126 Tex. 296, 312. This principle is a limitation upon the so called "Rule of Capture" under which the surface owner is entitled not only to the amount of oil under his land but to all other oil which he can drain from under his neighbor's land to his own. The rule of capture is discussed by Ely, *supra*, note 12, at 1218.

[15] "We believe it would be impossible for the Legislature to lay down a definite standard by which it could be determined correctly just when and under what conditions an oil producing area should be divided into drilling units and what size and shape the units should be. . . . In performing its functions as a fact-finding body, the Corporation Commission is empowered . . . to take evidence upon all these subjects and others found by scientific investigation and research to have a bearing upon securing the greatest possible

holder may, subject to qualifications noted, be entitled under current Texas law to the oil under his land, there can be no absolute certainty as to how much oil actually is present, *Rowan and Nichols*, 311 U. S. 570, 576, and since the waste and confiscation problems are as a matter of physical necessity so closely interrelated, decision of one of the questions necessarily involves recognition of the other.[16] The sheer quantity of exception cases makes their disposition of great public importance. It is estimated that over two-thirds of the wells in the East Texas field exist as exceptions to the rule, and since each exception may provoke a conflict among the interested parties, the volume of litigation arising from the administration of the rule is considerable.[17] The instant case arises from just such an exception. It is not peculiar that the state should be represented here by its Attorney General, for cases like this, involving "confiscation", are not mere isolated disputes between private parties. Aside from the general principles which may evolve from these proceedings, the physical facts are such that an additional permit may affect pressure on a well miles away. The standards applied by the Commission in a given case necessarily affect the entire state conservation system. Of far more importance than any other private interest is the fact that the over-all plan of regulation, as well as each of its case by case

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recovery from the common source of supply, and by application of the principles of physics, chemistry, geology, and mathematics, can determine by certain calculations at what intervals of space wells should be located in order to bring about such recovery and thus prevent waste and also protect the correlative rights of all of the owners of interests therein." Patterson v. Stanolind Oil & Gas Co., 182 Okla. 155, 161, 162.

[16] In Danciger Oil and Refining Co. v. Railroad Commission, 49 S. W. 2d 837, 842, the court describes the geological phenomena which are the basis of the rules of law dealing with leaseholders who, through full utilization of their own tracts, might cause waste for others, and continues: "No particular lease or well can therefore be taken as a unit, but must be considered in its relation to adjacent leases or wells, with a view to conserving the whole, and is subject to regulation accordingly."

The well spacing program and the proration program can not be considered separately; "the two are a part of a single integrated system and must be considered together." Davis, note 12, *supra*, at 55. For a discussion of the interrelation of spacing and proration see Ely, *supra*, note 12, at 1229. Because of the economic consequences of granting exceptions under Rule 37, the Commission must be given fair latitude to exercise "sound judgment and discretion." Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 79; and because of the difficulties of decision, the Commission must be allowed a "reasonable margin for error." Railroad Commission v. Shell Oil Co., 139 Tex. 66, 75.

[17] The Commission dealt with approximately sixty Rule 37 cases, including this one, in one or another courts in 1941. Annual Report of the Railroad Commission of Texas, 1941, pp. 15-26. Ely, *supra*, note 12, 1230, estimates that 17,000 wells in the East Texas field are operated under exception permits.

manifestations, is of vital interest to the general public which must be assured that the speculative interests of individual tract owners will be put aside when necessary to prevent the irretrievable loss of oil in other parts of the field. The Commission in applying the statutory standards of course considers the Rule 37 cases as a part of the entire conservation program with implications to the whole economy of the state.[18]

With full knowledge of the importance of the decisions of the Railroad Commission both to the State and to the oil operators, the Texas legislature has established a system of thorough judicial review by its own State courts. The Commission orders may be appealed to a State district court in Travis County, and are reviewed by a branch of the Court of Civil Appeals and by the State Supreme Court.[19] While the constitutional power of the Commission to enforce Rule 37 or to make exceptions to it is seldom seriously challenged, *Brown* v. *Texas Oil & Gas*, 126 Tex. 296, 307, the validity of particular orders from the standpoint of statutory interpretation may present a serious problem, and a substantial number of such cases have been disposed of by the Texas courts which alone have the power to give definite answers to the questions of State law posed in these proceedings.

In describing the relation of the Texas court to the Commission no useful purpose will be served by attempting to label the court's position as legislative, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Keller* v. *Potomac Elec. Co.*, 261 U. S. 428, or judicial, *Bacon* v. *Rutland Railroad*, 232 U. S. 134—suffice it to say that the Texas courts are working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry. The Commission is charged with principal responsibility for fact finding and for policy making and the courts expressly disclaim the administrative responsibility, *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, but on the other hand, the

[18] "The Commission is charged generally with the conservation of oil and gas in their production, storage, transportation. . . . The Commission must make rules, regulations, and orders to accomplish conservation of oil and gas. . . . One of the things that the Commission must do to conserve oil and gas is to see that oil and gas fields are drilled in an orderly and scientific manner. In order to accomplish orderly drilling, the Commission has simply promulgated a rule fixing minimum spacing distances at which wells may be drilled without application, notice, or hearing. Anyone desiring to drill a well at a lesser distance must secure a special permit, after notice and hearing." Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 69.

[19] Vernon's Texas Stat. § 6049(c)(8).

orders of the Commission are tested for "reasonableness" by trial de novo before the court, *Commission* v. *Shell Oil Co.*, 139 Tex. 66, 76-80, and the Court may on occasion make a careful analysis of all the facts of the case in reversing a Commission order. *Railroad Commission* v. *Gulf Production Co.*, 134 Tex. 122. The court has fully as much power as the Commission to determine particular cases, since after trial de novo it can either restrain the leaseholder from proceeding to drill, or, if the case is appropriate, can restrain the Commission from interfering with the leaseholder. The court may even formulate new standards for the Commission's administrative practice and suggest that the Commission adopt them. Thus, in the *Shell Oil* case, *supra*, at 73, the Court took the responsibility of "laying down some standard to guide the Commission in the exercise of its discretion" in Rule 37 cases; and in *Brown* v. *Humble Oil Co.*, *supra*, 312, the Court explicitly suggested a revision in Rule 37.

To prevent the confusion of multiple review of the same general issues, the legislature provided for concentration of all direct review of the Commission's orders in the State district courts of Travis County. The Texas courts have authoritatively declared the purpose of this restriction: "If an order of the commission, lawful on its face, can be collaterally attacked in the various courts and counties of the state on grounds such as those urged in the instant case, interminable confusion would result." *Texas Steel Co.* v. *Fort Worth and D. C. Ry. Co.*, 120 Tex. 597, 604. To permit various state courts to pass upon the Commission's rules and orders, "would lead to intolerable confusion. If all district courts of this state had jurisdiction of such matters, different courts of equal dignity might reach different and conflicting conclusions as to the same rule. Manifestly the jurisdictional provision under discussion was incorporated in the act for the express purpose of avoiding such confusion." *Alpha Petroleum Co.* v. *Terrel et al.*, 122 Tex. 257, 273. Time and experience, say the Texas courts, have shown the wisdom of this rule.[29] Concentration of judicial supervision of Railroad Commission orders permits the state courts, like the Railroad Commission itself, to acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands in this field.

[29] West Texas Compress Co. v. Panhandle & S. F. R. Co., 15 S. W. 2d 558, 561.

At the present time, less than ten per cent of these cases come before the federal district court.[21]

The very "confusion" which the Texas legislature and Supreme Court feared might result from review by many state courts of the Railroad Commission's orders has resulted from the exercise of federal equity jurisdiction. As a practical matter, the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide. Texas courts can give fully as great relief, including temporary restraining orders, as the federal courts. Delay, misunderstanding of local law, and needless federal conflict with the State policy, are the inevitable product of this double system of review. The most striking example of misunderstanding has come where the federal court has flatly disagreed with the position later taken by a State court as to State law. See *McMillan* v. *Railroad Commission*, 51 F. 2d 400, 287 U. S. 576, and *Danciger Oil and Refining Co.* v. *Railroad Commission*, 49 S. W. 2d 837, 122 Tex. 243. In those cases, the federal court attributed a given meaning to the state statute which went to the heart of the control program. The Court of Civil Appeals disagreed, but before ultimate review could be had either in Texas or here, the legislature amended its statutes so that the cases became moot. Had the Texas Civil Appeals decision come first, it would have been unnecessary to make the changes which were made in an effort to stay within the limit thought by the Governor of Texas to have been set by the tone of the federal court's opinion.[22] The Texas legislature later changed the law back to its original state, as clear an example of waste motion as can be imagined.[23] The federal court ha been called upon constantly to determine whether the Railroad Commission has acted within the scope of statutory authority, while the important con-

[21] Summary of Litigation, Annual Report of the Oil and Gas Division, Railroad Commission of Texas, 1941, 15 *et seq.*

[22] In his message of August 3, 1931, to the Texas legislature, concerning the McMillan decision, Governor Sterling said: "At the time the opinion was written, the court, knowing that the Legislature was in session, it may be reasonably assumed that if the court had thought the laws were invalid, would have held so as to give this Legislature an opportunity to eliminate and correct any cause for invalidity. The court having failed to do this, we are justified in assuming that our existing conservation laws are valid. . . . It appeals to me, in view of this decision of the United States Court, that it would be unwise to attempt radical changes in our existing laws. Any attempt at their amendment or modification should retain their general structure and ideas, and not inject changes that would invite any new attacks upon them." Texas Senate Journal, July-August, 1931, p. 594.

[23] Hardwicke, *supra*, note 12, 230-239.

stitutional issues have, as the federal court has repeatedly said, been fairly well settled from the beginning.[24]

These federal court decisions on state law have created a constant task for the Texas Governor, the Texas legislature, and the Railroad Commission. The Governor of Texas, as has been noted above, felt called upon to forge his oil program in the light of the remotest inferences of federal court opinions. In one instance he thought it necessary to declare martial law.[25] Special sessions of the legislature have been occupied with consideration of federal court decisions.[26] Legislation passed under the circumstances of the strain and doubt created by these decisions was necessarily unsatisfactory.[27] The Railroad Commission has had to adjust it-

[24] In 1936, in an action to restrain the enforcement by the State Commission of an order limiting the production of gas, the federal court said: "This controversy has been long drawn out. In varying forms, under different statutes, but always to the same purport and effect as to these complainants, order after order has been drawn, enjoined, and drawn again. This is the fifth time this Court has written. Texoma Natural Gas Co. v. Railroad Commission, 59 F. 2d 750; Texoma Natural Gas Co. v. Terrell, 2 F. Supp. 168; Canadian River Gas Co. v. Terrell, 4 F. Supp. 222; Texas Panhandle Gas Co. v. Thompson, 12 F. Supp. 462." Consolidated Gas Utilities Corporation v. Thompson, 14 F. Supp. 318, 328.

In summarizing litigation prior to 1934, the federal court said: "In not a single one of these cases did we find the statute unreasonable or invalid. In not a single one did we find the orders invalid because, though complying with the statute, they violated the Constitution. In each of the cases in which injunctions issued we made it clear it was because we thought the orders had been entered in the teeth of statutes forbidding the commission's doing what it attempted to do." Amazon Petroleum Corporation v. Railroad Commission, 5 F. Supp. 633, 635.

For a survey of litigious history of the East Texas field, see Hardwicke and Davis, note 12, *supra*.

[25] For a discussion of the martial law interlude, see Sterling v. Constantin, 287 U. S. 378; Hardwicke, *supra*, note 12, 233-236.

[26] The special session of July and August, 1931, was in session when McMillan v. Railroad Commission was decided, and, as has been noted above, the McMillan case provided the special session with the bulk of its business. Peoples' Petroleum Producers v. Smith, 1 F. Supp. 361 was the cause of the special session of November, 1932. In his introductory message to the special session, Governor Sterling said: "Most assuredly, I would not, at this time, have called you into extraordinary session except I believe a grave crisis again confronts the State and our people on account of the Federal Court having held that the Railroad Commission has gone beyond the authority given in this statute enacted at that time in promulgating their orders as to proration and conservation of oil and gas. . . . It is apparent that [as a result of the decision] the state's greatest natural resource—oil and gas —will be wasted and destroyed, resulting in a tremendous financial injury to the state, especially to the taxpayers and the public schools. It is apparent that under such conditions, the state's income, as a result of the gross production tax on oil, will be reduced from approximately $16,000 a day to a few thousand dollars per day, thus depriving the State of a tremendous amount of revenue." Texas Senate Journal, Nov. 1932, pp. 3, 4.

[27] Consider for example the plight of the state authorities during the period in which the federal court found it necessary to reject the Commission's ex-

self to the permutations of the law as seen by the federal courts. The most recent example was in connection with the *Rowan and Nichols* case in which the Commission felt compelled to adopt a new proration scheme to comply with the demands of a federal court decision which was reversed when it came to this Court. 311 U. S. 570, 572.

As has been noted the federal court cases have dealt primarily with the interpretation of state law, some of it state law fairly remote from oil and gas problems. The instant case raised a number of problems of no general significance on which a federal court can only try to ascertain state law.[28] For example, we are asked to determine whether a previous Travis county district court decision makes this case res adjudicata and whether another case pending in Travis county deprived the Commission of jurisdiction to consider Burford's application. The existence of these problems throughout the oil regulatory field creates a further possibility of serious delay which can injure the conservation program, for under our decision in *Railroad Commission* v. *Pullman Co.*, 312

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pert testimony on a basic matter of policy as "largely theory and speculation" in the McMillan case, *supra*, similar testimony was accepted by the state court in the Danciger case, *supra*, and like testimony was in turn accepted by the Federal Court in Amazon Petroleum Corporation v. Railroad Commission, 5 F. Supp. 633.

Governor Allred in his message of Jan. 16, 1935, recommended to the legislature that it revise the conservation laws generally. He said, "Much of the trouble of the oil industry and the official life charged with its regulation has been due to misunderstandings, misinformation, and ill-considered criticism by those either unfamiliar or unconcerned with the magnitude or proper solution of its problems or the practical difficulties confronting our public officials in this new and unexplored field of regulation. In the past, not a little of our difficulties has been due to the fact that laws dealing with the production of oil and gas, as well as the rules and regulations of the conservation commission, passed thereunder, have been enacted under high pressure at a time when, figuratively speaking, the 'House was on fire'." Texas Sen. Journal, Reg. Sess. 1935, 84, 89.

[28] The company presses upon us as significant in the determination of its rights the following four questions of state law:

(1) Burford's 2.33 acres were voluntarily subdivided from a larger portion and therefore the State Commission under the State law has no authority to permit an exception to prevent confiscation.

(2) "As a matter of state law, under the undisputed evidence, the judgment . . . is res adjudicata."

(3) The pendency of a related cause in the state courts, "under the law of the State . . . deprived the Railroad Commission pendente lite of jurisdiction."

(4) "The granting of four locations [was] without authority in the State law" and was arbitrary.

To determine the validity of these assertions presenting obviously difficult problems of state law, we are asked by the company to analyze at least fifty Texas decisions. If the Federal Court misinterprets only one of these decisions, we shall have provoked a needless conflict with the Texas courts.

U. S. 496, it may be necessary to stay federal action pending authoratative determination of the difficult state questions.

The conflict between federal courts and Texas has lessened appreciably in recent years primarily as a result of the decisions in the *Rowans and Nichols* case. 310 U. S. 573; 311 U. S. 614; 311 U. S. 570. In those cases we assumed that the principal issue in the review of Railroad Commission orders was whether the Commission had confined itself within the boundaries of due process of law, and held that any special relief provided by state statutes must be pursued in a state court. It is now argued that under the decision of the Texas Supreme Court in *Railroad Commission* v. *Shell Oil Co.*, 139 Tex. 66, the courts, whether federal or state, are required to review the Commission's order not for constitutional validity, but for compliance with a standard of "reasonableness" under the state statute which, it is said, is different from the constitutional standard of due process.

The whole cycle of federal-state conflict cannot be permitted to begin again by acceptance of this view. Insofar as we have discretion to do so, we should leave these problems of Texas law to the State court where each may be handled as "one more item in a continuous series of adjustments." *Rowan and Nichols, supra*, 310 U. S. at 584.

These questions of regulation of the industry by the State administrative agency, whether involving gas or oil prorationing programs or Rule 37 cases, so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them. "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. . . . These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary . . . This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authorities without the need of rigorous congressional restriction of those powers." *Railroad Commission* v. *Pullman Co.*, *supra*, 500, 501.[29]

[29] Equity's discretion to decline to exercise its jurisdiction may be applied when judicial restraint seems required by considerations of general welfare. "Courts of equity may, and frequently do, go much farther both to give and

The state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Cf. *Mathews* v. *Rodgers*, 284 U. S. 521. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

The decision of the Circuit Court of Appeals is reversed and the judgment of the District Court dismissing the complaint is affirmed for the reasons here stated.

It is so ordered.

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withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginian Ry. v. System Federation, 300 U. S. 515, 552. It is particularly desirable to decline to exercise equity jurisdiction when the result is to permit a State court to have an opportunity to determine questions of State law which may prevent the necessity of decision on a constitutional question, City of Chicago v. Fielderest Dairies, 316 U. S. 168, 173. Equity relief may be withheld where the State remedy is adequate, Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U. S. 563, or, if a Federal Court is asked to review the proceedings of a Federal agency by injunction, where an adequate statutory method of review has been provided, Myers v. Bethlehem Shipbuilding Co., 303 U. S. 41. In recent years, this Court has refused to permit the exercise of federal equity jurisdiction to enjoin the enforcement of State criminal statutes, Beal v. Missouri Pacific Railway Corp., 312 U. S. 45; Watson v. Buck, 313 U. S. 387;; Douglas v. City of Jeannette, — U. S. —. We have refused to permit injunctions to interfere with the collection of state taxes, California v. Lattimer, 305 U. S. 255; Kohn v. Central Distributing Co., 306 U. S. 531; and see 28 U. S. C. § 41. We have held that an equity court "may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest." Securities & Exchange Comm. v. United States Realty Co., 310 U. S. 434, 455; American United Mutual Life Ins. Co. v. City of Avon Park, Florida, 311 U. S. 138, 145. Equity in its discretion may decline to aid a utility which seeks to prevent a public service commission from making an investigation which is at least arguably within its power, Petroleum Exploration Inc. v. Public Service Comm., 304 U. S. 209; or a railroad which has an adequate form of state relief, Illinois Commerce Comm. v. Thompson, — U. S. —. Equity may impose terms and conditions upon the party at whose instance it proposes to act and "the power to impose such conditions is founded upon, and arises from, the discretion which the Court has in such cases, to grant, or not to grant, the injunction applied for." Inland Steel Co. v. United States, 306 U. S. 153, 156.

Mr. Justice DOUGLAS, concurring.

I agree with the opinion of the Court and join in it. But there are observations in the dissenting opinion which impel me to add a few words. If the issues in this case were framed as the dissenting opinion frames them, I would agree that we should reach the merits and not direct a dismissal of the complaint. But the opinion of the Court as I read it does not hold or even fairly imply that "the enforcement of state rights created by state legislation and affecting state policies is limited to the state courts." Any such holding would result in a drastic inroad on diversity jurisdiction—a limitation which I agree might be desirable but which Congress not this Court should make. The holding in these cases, however, goes to no such length.

This decision is but an application of the principle expressed in *Pennsylvania* v. *Williams*, 294 U. S. 176, 185, that "federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of State governments in carrying out their domestic policy." That case, like the present one, was in the federal court by the diversity of citizenship route. It involved a receivership of an insolvent Pennsylvania corporation. Though the federal proceeding was first in time, this Court held that the federal court should stay its hand and turn over the assets of the corporation to the state administrative agency charged by state law with the responsibility of supervision and liquidation. In that case federal action would have preempted the field and excluded the assertion of state authority. In these cases the result of federal action would be potentially much more serious in terms of federal-state relations, as the opinion of the Court makes plain.

The Texas statute which governs suits to set aside these orders of the Railroad Commission has been construed by the Texas courts to give to the supervising courts a large measure of control over the administrative process. That control is much greater, for example, than the control exercised by federal Circuit Courts of Appeal over the orders of such agencies as the National Labor Relations Board. The opinion of the Court calls the Railroad Commission and the Texas courts "working partners". But as its review of Texas decisions shows the courts may at times be the senior and dominant member of that partnership if they perform the functions which Texas law places on them. The courts do not

sit merely to enforce rights based on orders of the state administrative agency. They sit in judgment on that agency. That to me is the crux of the matter. If the federal courts undertook to sit in review, so to speak, of this state administrative agency, they would in effect actively participate in the fashioning of the state's domestic policy. That interference would be a continuing one, as the opinion of the Court points out. Moreover, divided authority would result. Divided authority breeds friction—friction potentially more serious than would have obtained in *Pennsylvania* v. *Williams*, if the administration of the affairs of that insolvent corporation had been left in the federal court to the exclusion of the state administrative agency.

Mr. Justice MURPHY joins in this opinion.

Mr. Justice FRANKFURTER, dissenting.

To deny a suitor access to a federal district court under the circumstances of this case is to disregard a duty enjoined by Congress and made manifest by the whole history of the jurisdiction of the United States courts based upon diversity of citizenship between parties. For I am assuming that law declared by this Court, in contradistinction to law declared by Congress, is something other than the manipulation of words to formulate a predetermined result. Judicial law to me implies at least some continuity of intellectual criteria and procedures in dealing with recurring problems.

I believe it to be wholly accurate to say that throughout our history it has never been questioned that a right created by state law and enforceable in the state courts can also be enforced in the federal courts where the parties to the controversy are citizens of different states. The reasons which led Congress to grant such jurisdiction to the federal courts are familiar. It was believed that, consciously or otherwise, the courts of a state may favor their own citizens. Bias against outsiders may become imbedded in a judgment of a state court and yet not be sufficiently apparent to be made the basis of a federal claim. To avoid possible discriminations of this sort, so the theory goes, a citizen of a state other than that in which he is suing or being sued ought to be able to go into a wholly impartial tribunal, namely, the federal court sitting in that state. Thus, the basic premise of federal

jurisdiction based upon diversity of the parties' citizenship is that the federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts. That is the theory of diversity jurisdiction. Whether it is a sound theory, whether diversity jurisdiction is necessary or desirable in order to avoid possible unfairness by state courts, state judges and juries, against outsiders, whether the federal courts ought to be relieved of the burden of diversity litigation,—these are matters which are not my concern as a judge. They are the concern of those whose business it is to legislate, not mine. I speak as one who has long favored the entire abolition of diversity jurisdiction. See 13 Cornell L. Q. 499, 520 *et seq.* But I must decide this case as a judge and not as a legislative reformer.

Aside from the Johnson Act of May 14, 1934, 48 Stat. 775,[1] the many powerful and persistent legislative efforts to abolish or restrict diversity jurisdiction have ever since the Civil War been rejected by Congress. Again and again legislation designed to make inroads upon diversity jurisdiction has been proposed to Congress, and on each occasion Congress has deliberately refused to act. See, for example, the recent efforts to restrict diversity jurisdiction which were provoked by the *Black & White Taxicab* decision, 276 U. S. 518; Sen. Rep. No. 626, 70th Cong., 1st Sess.; Sen. Rep. No. 691, 71st Cong., 2d Sess.; Sen. Rep. No. 530 and Sen. Rep. No. 701, 72d Cong., 1st Sess. We are dealing, then, not with a jurisdiction evolved and shaped by the courts but rather with one explicitly conferred and undeviatingly maintained by Congress.

The only limitations upon the exercise of diversity jurisdiction—apart from that which Congress made in the Johnson Act—are, broadly speaking, those illustrated by *Railroad Comm'n* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, as amended in 311 U. S. 614 15; *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496; and *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168. In *Rowan & Nichols*

[1] The Johnson Act provides that no district court can enjoin the enforcement of any order issued by a state administrative body where the jurisdiction of the court "is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States", and "where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State".

Since the order under review in this case did not in any way affect rates chargeable by any public utility, the Johnson Act is inapplicable.

the claim based upon state law was derived from a statute requiring proration on a "reasonable basis", and it was not clear from the decisions of the state courts whether such courts might exercise an independent judgment as to what was "reasonable". 311 U. S. at 615. And in *Pullman* it was also "far from clear" whether state law, as authoritatively defined by the local courts, might not displace the federal questions raised by the bill. 312 U. S. at 499. Where the controlling state law is so undefined that a federal court attempting to apply such law would be groping utterly in the dark—where "no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination", *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. at 499—a court of equity may "avoid the waste of a tentative decision", *id.*, at 500. The *Pullman* and *Fieldcrest Dairies* cases are merely illustrative of one phase of the basic constitutional doctrine that substantial constitutional issues should be adjudicated only when no alternatives are open. A definitive ruling by the state courts upon the questions of construction of the state statutes might have terminated the controversies in those cases and thus eliminated serious constitutional questions. Under such circumstances it was an affirmation and not a denial of federal jurisdiction in each of those cases for the district court to hold the bill pending a seasonable determination of the local issues in a proceeding to be brought in the state courts.

If, in a case of this sort, the state right sought to be enforced in the federal courts depended upon a "forecast rather than a determination" of state law, if the federal court was practically impotent to enforce state law because of its inability to fathom the complexities, legal or factual, of local law, the rule of *Rowan & Nichols* would be applicable. In such a situation the line of demarcation between what belongs to the state administrative body and what to its courts should not be drawn by the federal courts. If it could be shown that the circumstances of this case warranted the application of such a doctrine of abstention, I would gladly join in the decision of the Court. But such a showing has not been attempted, nor, I believe, could it be made.

Let us examine briefly the nature of the rights sought here to be enforced in the federal courts. In 1919 the Texas Railroad Commission issued its Rule 37 imposing general spacing limitations upon the drilling of oil wells, "provided that the Commission

in order to prevent waste or to prevent the confiscation of property" would grant exceptions from the general restrictions. The order of the Railroad Commission in this case granted a permit to drill a well in exception to Rule 37. Section 8 of Article 6049c of Vernon's Texas Civil Statutes, 1925, provides that any "interested person affected by . . . any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders."

Looking only at the statute one could find at least two possible sources of ambiguity and confusion. By what standards should the courts be governed in reviewing the "validity" of Commission orders? Does the statutory limitation of courts "of competent jurisdiction in Travis, County, Texas," preclude review in the federal district court sitting in Travis County? Fortunately, we need no longer look only to the words of the statute. These questions are not new. They are not presented in this case for the first time. We are not writing on a clean slate.

It is true that Texas law governing review of Commission orders under Rule 37 has not always been clear and certain, and that there may be parts of the statute and some of the Railroad Commission's Rules, with which we are not now concerned, which, like other legal materials, are not as clear as they might be. But, in a series of recent decisions, the Supreme Court of Texas has not only given precision to the concepts of "waste" and "confiscation of property" employed in Rule 37, it has also defined with clarity the scope of judicial review of Commission action. In *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 70-71, the Court held that "the term 'confiscation' evidently has reference to depriving the owner or lessee of a fair chance to recover the oil and gas in or under his land, or their equivalents in kind. It is evident that the word refers principally to drainage. Under one of the exceptions in Rule 37, well permits may be granted to prevent 'confiscation'. It is the law that every owner or lessee is entitled to a fair chance to recover the oil and gas in or under his land or their equivalents in kind. Any denial of such fair chance would be 'confiscation' within the meaning of Rule 37". And in *Railroad Commission of Texas v. Shell Oil Co.*, 139 Tex.

66, 80, decided by the Supreme Court of Texas on March 11, 1942, the scope of judicial review contemplated by Texas law was authoritatively defined: "In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same. Whether the agency heard sufficient evidence is not material." See also *Cook Drilling Co.* v. *Gulf Oil Corp.*, 139 Tex. 80, decided the same day.

In other words, as the Circuit Court of Appeals has said in this case, "We now know the legal requisites of orders and regulations of the Railroad Commission under the conservation laws of Texas. . . . Whether the Commission heard evidence or not is immaterial; it is not required to take testimony or make findings of fact before promulgating its orders. Such procedure is foreign to the law of Texas, although customary under federal statutes. If the facts in existence when the order was made, as later shown by evidence before the court, were such that reasonable minds could not have reached the conclusion arrived at by the Commission, or if the agency exceeded its power, then the order should be set aside by any court of competent jurisdiction." 130 F. 2d 10, 14-15.

Clearly, therefore, the scope of judicial review in a Rule 37 case, as declared by the Supreme Court of Texas, is precisely as well defined, for example, as the scope of judicial review by the federal courts of orders of the Interstate Commerce Commission or the National Labor Relations Board. That the scope of review may be different does not make the standards of review any less definite or less susceptible of application by a court. I think there can be no doubt that under the Constitution and laws of Texas, as construed by the decisions of the state courts, such courts exercise a judicial power in these cases precisely similar to that wielded by the federal courts under Article III. Can it be said, therefore, that in considering the validity of an exception allowed by the Texas Railroad Commission under Rule 37, the federal judges sitting in that state are engaged in duties which are foreign to their experience and abilities? Judges who sit in judgment upon the legality of orders made by the Interstate Commerce Com-

mission are certainly not incompetent to apply the narrowly defined standards of law established by Texas for review of the orders of its Railroad Commission.

We come, then, to the question whether Texas has manifested any desire to confine such review to the state courts sitting in Travis County. A little history will go a long way in answering this question. On April 3, 1891, the Texas legislature enacted a statute creating the Texas Railroad Commission. Section 6 provided that suits to set aside Commission orders could be brought "in a court of competent jurisdiction in Travis County, Texas". And, naturally enough, the question soon arose whether this provision prevented review in the federal court sitting in Travis County. Almost fifty years ago there came before this Court a memorable litigation in which the meaning and purpose of the provision were thoroughly canvassed. In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391-92, decided May 26, 1894, this Court unanimously held that "it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. . . . We need not, however, rest on the general powers of a Federal court in this respect, for in the act before us express authority is given for a suit against the commission. . . . The language of this provision [§ 6 of the 1891 statute] is significant. It does not name the court in which the suit may be brought. It is not a court of Travis County, but in Travis County. The language differing from that which ordinarily would be used to describe a court of the State was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts."

For almost fifty years the holding in the *Reagan* case has not been questioned. On the contrary, it has always been taken for granted that the District Court for the Western District of Texas is "a court of competent jurisdiction in Travis County" and a suitable forum in which to challenge the validity of orders of the Texas Railroad Commission. One need only look at the tables of cases in both the lower federal courts and in this Court to obtain a sense of the solidity of this exercise of jurisdiction. Section 8

of Article 6049c, the Texas legislation immediately before us, was originally enacted in 1932. The Texas legislature might expressly have sought to restrict judicial proceedings with respect to Commission orders to the state courts of Travis County. This it has done in other situations. See, *e. g.*, Art. 911e, § 10 of Vernon's Revised Civil Statutes, 1925 (appeal by applicant for transportation agent's license from denial of application by Railroad Commission); Art. 3286 (suits by heirs or claimants to escheated lands); Art. 5032 (appeals from revocation or suspension of authority with respect to reciprocal insurance); Art. 8307, § 7 (suits to recover penalties from employers failing to report injuries under workmen's compensation law). In these statutory provisions jurisdiction is specifically limited to the "District Court in Travis County, Texas", the state court. But in Article 6049c the Texas legislature used the phrase "in a court of competent jurisdiction in Travis County", precisely the same as that which had been construed by this Court in the *Reagan* case. How, then, can it be fairly said that the Texas legislature meant to exclude the federal courts from exercising jurisdiction in these cases?

And so, the case really reduces itself to this: in the actual application of the standards governing judicial review of Commission orders allowing exceptions under Rule 37—standards which today have been authoritatively and precisely defined—a different result may be obtained if suit is brought in the federal rather than the state courts. And why? Because federal judges are less competent and less fair than state judges in applying the rules that are binding upon both? If this were true here, it would be equally true as applied to almost all types of litigation brought into federal courts to enforce state-created rights. The explanation may perhaps lie in the realm of what has sometimes been called "psychological jurisprudence". In the assessment of evidence and the other elements which enter into a judicial judgment, a federal judge may make judgments different from those which a state judge may make. Federal judges are perhaps to be regarded as men apart—judges who cannot be trusted to judge fairly and impartially. But if this be our premise, why should it not follow that the federal courts are, because of their putative bias, to be denied the right to hear insurance cases, or cases involving controversies between debtors and creditors, landlords and tenants, employers and employees, and all the other complicated controversies arising out of the local law of the forty-eight states?

It is the essence of diversity jurisdiction that federal judges and juries should pass on asserted claims because the result might be different if they were decided by a state court. There may be excellent reasons why Congress should abolish diversity jurisdiction. But, with all deference, it is not a defensible ground for having this Court by indirection abrogate diversity jurisdiction when, as a matter of fact, Congress has persistently refused to restrict such jurisdiction except in the limited area occupied by the Johnson Act. The Congressional premise of diversity jurisdiction is that the possibility of unfairness against outside litigants is to be avoided by providing the neutral forum of a federal court. The Court today is in effect withdrawing this grant of jurisdiction in order to avoid possible unfairness against state interests in the federal courts. That which Congress created to assure impartiality of adjudication is now destroyed to prevent what is deemed to be hostility and bias in adjudication.

Of course the usual considerations governing the exercise of equity jurisdiction are equally applicable to suits in the federal courts where jurisdiction depends upon the diversity of the parties' citizenship. The chancellor certainly must balance the equities before granting relief; he should stay his hand where another court seized of the controversy can do justice to the claims of the parties; he may refuse equitable relief where the asserted right is doubtful because of the substantive law which he must find as declared by the state. But it is too late in the day to suggest that the chancellor may act on whimsical or purely personal considerations or on private notions of policy regarding the particular suit. It is not for us to say that litigation affecting state laws and state policies ought to be tried only in the state courts. Congress has chosen to confer diversity jurisdiction upon the federal courts. It is not for us to reject that which Congress has made the law of the land simply because of our independent conviction that such legislation is unwise.

This is not just an isolated case. To order the dismissal of this litigation, on this record and in the present state of Texas law, is not merely to decide that the federal court in Travis County, Texas, should no longer entertain suits brought under the Texas conservation laws. We are holding, in effect, that the enforcement of state rights created by state legislation and affecting state policies is limited to the state courts. It means, candidly, that we should reexamine all of the cases—and there have been

many—since the *Reagan* decision almost half a century ago. Do we not owe it to the lower federal courts, for example, to tell them where a case like *Texas Pipe Line Co.*, v. *Ware*, 15 F. 2d 171, now stands? In that case the federal court entertained a suit to enforce rights arising under a state workmen's compensation law. Would it be error for a federal judge to do so today?

Perhaps no judicial action calls for a more cautious exercise of discretion than the appointment of a receiver by a court of equity, especially where the enterprise to be administered relates to important public interests. Such a situation was presented to this Court in *Pennsylvania* v. *Williams*, 294 U. S. 176, in which—solely on the score of diversity of citizenship—a federal court was asked to assume the management of a Pennsylvania building and loan association. The problem before this Court was not whether the controversy should be adjudicated by a federal rather than a state court, but whether, as a matter of sound judicial administration, a court of equity should take hold of the affairs of the association by putting a judicial officer in charge when in fact the state had established an administrative system whereby "the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent", 294 U. S. at 184, was entrusted to a permanent, experienced state agency. The question was not at all whether a federal court should abdicate its authority in favor of a state court where the rules of law which would govern a suit in a state court would be precisely the same as those which a federal court would be bound to apply. The *Williams* case, in other words, is but an application of the traditional doctrine that a court of equity should stay its hand from the improvident appointment of a receiver.

To talk about courts as "working partners" with administrative agencies whenever there is judicial review of administrative action is merely another way of saying that legislative policies are enforced partly through administrative agencies and partly through courts. *See United States* v. *Morgan*, 307 U. S. 183, 191. But the use of such colloquial expressions can hardly obliterate the distinction between judicial power and legislative power, whether the latter be exercised directly by the legislature or indirectly through its administrative agencies. The courts of Texas sit in judgment upon the Railroad Commission of Texas only in so far as they have been charged by Texas law with the duty of ascertaining the

See also, Kane v. Wilson, 307 U.S. 268.

validity of Commission action. They no more "participate in the fashioning of the state's domestic policy" than the federal courts participate in the fashioning of the transportation policy of the federal government in reviewing orders of the Interstate Commerce Commission under the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. § 47.

Therefore, unless all functions of courts heretofore deemed to be judicial in nature even though they involve appropriately defined review of actions taken by administrative agencies are now to be deemed administrative in nature, the circumstance that a right asserted before a court arises from a controversy that originated before an administrative agency cannot alter either the nature of the power being exercised by the court or its capacity to entertain jurisdiction. One might choose, for example, to describe this Court as the "working partner" of the Securities and Exchange Commission, the Comptroller of the Currency, the Commissioner of Internal Revenue, and the score of other administrative bodies the validity of whose actions frequently comes here for review. But such a characterization of our rôle in reviewing administrative orders does not make this exercise of our power any the less judicial or any the more administrative. Nor should it be adequate to wipe out a distinction that is so imbedded in our constitutional history and practice.

The opinion of the Court cuts deep into our judicial fabric. The duty of the judiciary is to exercise the jurisdiction which Congress has conferred. What the Court is doing today I might wholeheartedly approve if it were done by Congress. But I cannot justify translation of the circumstance of my membership on this Court into an opportunity of writing my private view of legislative policy into law and thereby effacing a far greater area of diversity jurisdiction than Senator Norris, as chairman of the Senate Judiciary Committee, was ever able to persuade Congress itself to do.

Mr. Justice ROBERTS and Mr. Justice REED join in this dissent.

The CHIEF JUSTICE expresses no views as to the desirability, as a matter of legislative policy, of retaining the diversity jurisdiction. In all other respects he concurs in the opinion of MR. Justice FRANKFURTER.